Supreme Court, U.S.
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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LIFE CARE CENTERS OF AMERICA, INC. AND AMERICAN LIFESTYLES, INC.,

Petitioners,

v.

EAST HAMPDEN ASSOCIATES LIMITED PARTNERSHIP, *ET AL.*,

Respondents.

Petition for a Writ of Certiorari to the Colorado Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

TIMOTHY B. DYK
(Counsel of Record)
GREGORY A. CASTANIAS
DANIEL H. BROMBERG
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, DC 20005-2088
(202) 879-3939

JEAN E. DUBOFSKY
JEAN E. DUBOFSKY, P.C.
Canyon Center Building
1881 9th Street, Suite 210
Boulder, Colorado 80302
(303) 447-3510

Counsel for Petitioners

51 pp

QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment permits a punitive damages award of $6 million where the state appellate court refused to conduct meaningful appellate review and, in particular, to consider objective factors such as the closeness of the award and the net worth of the defendant demonstrating the excessiveness of the award.

2. Whether in affirming an award of punitive damages, a state court is obligated by the Due Process Clause of the Fourteenth Amendment to articulate the basis for its conclusion that the award is constitutional.

3. Whether Colo. Rev. Stat. § 13-21-102(1)(a), which limits punitive damages to an amount equal to the compensatory award, makes it unnecessary for the Colorado courts to conduct meaningful appellate review of punitive damages awards.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the court of appeals were plaintiffs-appellants/cross-appellees Life Care Centers of America, Inc. and American Lifestyles, Inc. and defendants-appellees/cross-appellants East Hampden Associates Limited Partnerships, John W. Galston, Eugene H. Rosen, Bruce Weinstein, LPIMC, Inc. and Integon Life Insurance Corporation.

Pursuant to Supreme Court Rule 29.6, Petitioner Life Care Centers of America, Inc. hereby states that it has no parent companies or nonwholly owned corporate subsidiaries. Life Care does, however, hold partnership interests in limited partnerships. None of these limited partnerships are publicly traded.

Pursuant to Supreme Court Rule 29.6, Petitioner American Lifestyles, Inc. hereby states that its parent company is Life Care Centers of America, Inc. American Lifestyles has no nonwholly owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE WRIT 8

I. THE DECISION BELOW, WHICH FAILED TO CONSIDER THE OBJECTIVE FACTORS OF CLOSENESS OF THE CASE AND PETITIONER'S NET WORTH, CONFLICTS WITH THIS COURT'S *HONDA* AND *HASLIP* DECISIONS AND WITH THE DECISIONS OF OTHER COURTS. 9

A. The Lower Courts Are In Conflict As To Whether The Closeness Of The Case And Defendants' Net Worth Must Be Considered 11

B. The Lower Courts Are In Conflict As To Whether "Passion-and-Prejudice" Appellate Review Is Constitutionally Adequate. 15

II. THE DECISION BELOW, IN FAILING TO ARTICULATE ANY RATIONAL BASIS FOR THE PUNITIVE EXACTION, IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS 18

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

Adams v. Murikami, 813 P.2d 1348 (Cal. 1991) (en banc) 14

Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs., 596 A.2d 687 (Md. Ct. Spec. App. 1991) 17

Alley v. Gubser Dev. Co., 785 F.2d 849 (10th Cir.), *cert. denied*, 479 U.S. 961 (1986) 12

Arlinghaus v. Ritenour, 543 F.2d 461 (2d Cir. 1976) (per curiam) 21

BMW of North America, Inc. v. Gore, 646 So. 2d 619 (Ala. 1994), *cert. granted*, 115 S. Ct. 932 (1995) . . . 13, 22

Boyle v. Lorimar Prod., Inc., 13 F.3d 1357 (9th Cir. 1994) 18

Butterick Pub. Co. v. Boynton, 77 N.E. 705 (Mass. 1906) 6

Cash v. Beltman North American Co., 900 F.2d 109 (7th Cir. 1990) 15

Clark-Rice Corp. v. Waltham Bleachery & Dye Works, 166 N.E. 867 (Mass. 1929) 6

Coldwell Banker Commercial Group, Inc. v. Camelback Office Park, 751 P.2d 542 (Ariz. 1988) 6

Drabeck v. Stanley-Bostitch, Inc., 997 F.2d 496 (8th Cir. 1993) 12

Dunn v. Hovic, 1 F.3d 1371 (3d Cir. 1993) 15

Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377 (5th Cir. 1991) 17

Ezzone v. Riccardi, 525 N.W.2d 388 (Iowa 1994) 21

Foley v. Mathias, 233 N.W. 106 (Iowa 1930) 6

Fraidin v. Weitzman, 611 A.2d 1046 (Md. Ct. Spec. App. 1992) 14

Frick v. Abell, 602 P.2d 852 (Colo. 1979) 7, 16

Glasscock v. Armstrong Cork Co., 946 F.2d 1085 (5th Cir. 1991) 17

Gamble v. Stevenson, 406 S.E.2d 350 (S.C. 1991) 19

Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897 (W. Va. 1991) 17, 19, 21

TABLE OF AUTHORITIES (Cont'd)

Page

Gaty v. Sack, 19 Mo. App. 470 (1885) 6
Gumer v. Shearson, Hammill & Co., 516 F.2d 283 (2d Cir. 1974) 19
Hensley v. Eckerhart, 461 U.S. 424 (1983) 19
Hirshhorn v. Bradley, 90 N.W. 592 (Iowa 1902) 6
Hollins v. Powell, 773 F.2d 191 (8th Cir. 1985) 14
Honda Motor Co. Ltd. v. Oberg, 114 S. Ct. 2331 (1994) . . . . . *passim*
Kolender v. Lawson, 461 U.S. 352 (1983) 12, 13
Latham Seed Co. v. Nickerson American Plant Breeders, Inc., 978 F.2d 1493 (8th Cir. 1992) 17
Lemon v. Macklem, 122 N.W. 77 (Mich. 1909) 6
Lunsford v. Morris, 746 S.W.2d 471 (Tex. 1988) 14
Martin Pincus Mktg. v. Sawyer of Napa, Inc., 774 F. Supp. 171 (S.D.N.Y. 1991) 6
Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991) 16
Maxey v. Freightliner Corp., 665 F.2d 1367 (5th Cir. 1982) (en banc) 12
McEvoy v. Ginsberg, 189 N.E.2d 546 (Mass. 1963) 6
McGeehan v. Gaar, Scott & Co., 100 N.W. 1072 (Wis. 1904) 6
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 12
Olympia Hotels Corp. v. Johnson Wax Dev. Corp., 908 F.2d 1363 (7th Cir. 1990) 6
Orijas v. Stevenson, 31 F.3d 995 (10th Cir. 1994) . . . 11, 16
Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) . . . . . *passim*
Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984) 8, 9, 10, 16
R.G. Nelson, A.I.A v. M.L. Steer, 797 P.2d 117 (Idaho 1990) 6

TABLE OF AUTHORITIES (Cont'd)

Page

Raycarr Sales Corp. v. Herman Rynveld's Son Corp., 147 N.Y.S.2d 425 (Sup. Ct. 1955), *rev'd on other grounds*, 150 N.Y.S.2d 619 (App. Div. 1956) 6
Read Corp. v. Portec, Inc., 970 F.2d 816 (Fed. Cir. 1992) 12
Richards v. Michelin Tire Corp., 21 F.3d 1048 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 902 (1995) 11
SEC v. Chenery Corp., 318 U.S. 80 (1943) 20
Schaffer Transp. Co. v. United States, 355 U.S. 83 (1957) 20
Soneff v. Harlan, 712 P.2d 1084 (Colo. Ct. App. 1985) . . . 6
Southwestern Tel. & Tel. Co. v. Danaher, 238 U.S. 482 (1915) 11
Sprague v. Walter, 656 A.2d 890 (Pa. Super. Ct. 1995) 19, 21
Thompson v. Ferguson & Turnley, 250 S.W. 204 (Tex. Civ. App. 1923) 6
TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993) . . . . . *passim*

Constitutional Provisions, Statutes and Rules

U.S. Const. Amend. XIV, § 1 2
28 U.S.C. § 1257 2
35 U.S.C. § 284 12
Colo. Rev. Stat. § 13-21-102(1)(a) 8, 20
Colo. Rev. Stat. § 13-21-102(2) 15
Colo. Rev. Stat. § 13-21-102(3) 20
Fed. R. Civ. P. 54(b) 19

Miscellaneous Authority

12 Am. Jur. 2d, *Brokers* § 87 (1964) 6
Brief of Petitioner, *BMW of North America, Inc. v. Gore*, (U.S. March 23, 1995) (No. 94-896) 13

TABLE OF AUTHORITIES (Cont'd)

Page

Brief for Phillips Petroleum Co., *et al.*, as Amici Curiae, *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993) (No. 92-479) 22

Jane Massey Draper, *Excessiveness or Inadequacy of Punitive Damages in Cases Not Involving Personal Injury or Death*, 14 A.L.R.5th 242 (1993) 9

Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747 (1982) 19

1 James D. Ghiardi & John J. Kircher, *Punitive Damages Law & Practice* § 5.36 (1995) 14

1 *Mechem on Agency* § 1232 (1914) 6

Restatement (Second) of Agency § 394 & cmt. b (1958) . . . 6

Restatement (Second) of Torts § 908, cmt. e (1979) 14

Michael Rustaad & Thomas Koenig, *The Historical Continuity of Punitive Damage Awards: Reforming the Tort Reformers*, 42 Am. L. Rev. 1269 (1993) 15

Seavey on Agency § 151 (1964) 6

Sell on Agency § 135 (1975) 6

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Petition for a Writ of Certiorari to the Colorado Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

Life Care Centers of America, Inc. and American Lifestyles, Inc. (collectively, "Life Care") respectfully petition for a writ of certiorari to review the judgment of the Colorado Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Colorado Court of Appeals is reported at 903 P.2d 1180. It is reprinted at pages 1a-16a of the appendix to this petition. The Order of the Colorado Supreme Court denying certiorari review is unreported. It is reprinted at pages 17a-18a of the appendix to this petition. The order of the trial court denying Life Care's motion for judgment n.o.v. or new trial is unreported. This order is reprinted at page 19a of the appendix to this petition.

JURISDICTION

The judgment of the Colorado Court of Appeals was entered on March 23, 1995. A timely petition for certiorari in the Colorado Supreme Court was denied on October 2, 1995. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT

This case presents an important and recurring question concerning punitive damages awards that has divided the lower courts: What sort of reasoned analysis must an appellate court conduct when reviewing a jury's punitive damage award to ensure that the award is consistent with Due Process?

Petitioner Life Care Centers of America, Inc.[1] is a Tennessee corporation in the business of managing health care facilities, including nursing homes, retirement centers, and single-illness homes. App. 1a-2a. It operates over 140 facilities in 28 different states. Thirteen are located in Colorado; eight are located in the Denver metropolitan area.

Life Care began managing health care facilities in Colorado in 1981, when it contracted to manage Cherry Creek Nursing Home ("the nursing home") in Aurora, Colorado, a suburb of Denver. App. 2a. The nursing home's owner at that time was a limited partnership, Cherry Creek Medical Investors, Ltd. This contract contained no exclusivity provisions — it did not bar Life Care from managing competing facilities. It specifically recognized that Life Care was "engaged in providing nursing home management and technical services to nursing homes throughout the United States," (Pl. - Appellants' Br., Exh. 1 at 1 (Colo.

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[1] Petitioner American Lifestyles, Inc. is a division of Life Care which, like Life Care, also manages nursing homes and similar facilities. For the sake of convenience, this petition refers to both American Lifestyles and Life Care, collectively, as "Life Care."

App. Dec. 27, 1993)), and it required Life Care to offer the nursing home owner "participation" in Life Care's "national purchasing contracts" so that the owner would benefit from the economies of scale inherent in Life Care's management of multiple facilities. (*Id.*, Exh. 1 at 7). Life Care also informed the investors in the limited partnership that Life Care and its affiliates "have in the past and may in the future engage in other real estate activities, including investments in nursing homes," both as owners and as managers, "which may compete with the Partnership." (Pl. - Appellants' Br. at 4).

In 1987, while Life Care was still under contract to manage the nursing home, ownership of the nursing home passed to respondent East Hampden Associates Limited Partnership ("East Hampden"). App. 1a-2a. In 1989, Life Care undertook to manage two other Denver-area facilities, each owned by affiliates of Life Care, in addition to the nursing home owned by East Hampden. Cherry Creek Retirement Village ("the retirement village") was located on property adjacent to the nursing home. It offered a range of services, including assisted living.[2] Garden Terrace ("the Alzheimer's center") was conceived as a "Mayo Clinic" for the care of individuals with Alzheimer's disease; it was located about four miles from the nursing home. App. 2a. The nursing home offered both assisted living and Alzheimer's care, among other services. Those two new facilities competed with the nursing home in these areas for a year and a half without objection from East Hampden.

In 1990, respondent LPIMC, Inc.[3] became the new general partner of East Hampden. It attained that position by ousting the former general partner in a proxy battle. LPIMC's campaign was largely based on its promise to "renegotiat[e] management

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[2] Assisted living is a service for people who need assistance with daily activities such as walking, meals, and the like, but who desire to live in an independent, home-like environment.

[3] LPIMC stands for Limited Partnership Investment Management Committee.

contracts" or "replac[e]" too-costly managers. (Pl. - Appellants' Br. at 8). LPIMC's effort to keep this campaign promise focused on Life Care. In November 1990, LPIMC wrote its limited partners that it found Life Care's management fee "excessive, and we are investigating ways to reduce it." (*Id.*) When the parties were unable to negotiate an amended contract, LPIMC fired Life Care. App. 2a.

Life Care sued East Hampden and its general partners for damages for breach of the management agreement and tortious interference with contract. App. 2a. LPIMC, East Hampden, and the other defendants counterclaimed that Life Care had breached its contractual and fiduciary duties by managing other facilities. *Id.* Defendants also sought exemplary damages based on Life Care's allegedly improper competition. *Id.*

Before trial, Life Care moved for summary judgment on the ground that no contractual or fiduciary duty existed which prevented Life Care from managing competitors. The trial court agreed that there was no contractual duty to that effect, but disagreed as to the existence of a fiduciary duty, and allowed defendants to proceed with their fiduciary-duty counterclaims based on Life Care's competition.

The evidence at trial established that other entities in the business of nursing home management also routinely managed competing facilities. East Hampden's first general partner, Southmark Partners, operated other nursing homes that competed with the nursing home. Southmark Partners' parent company, Southmark, also represented competitors of the nursing home. Southmark Partners' successor, respondent LPIMC, Inc., also served as a general partner for competing facilities. National Heritage, a management company similar to Life Care, which was hired by LPIMC to supervise Life Care's management of the nursing home, represented at least five competing facilities in the Denver area. So too, the manager hired to replace Life Care also represented competitors of the nursing home.

Nonetheless, on October 27, 1992, the jury returned verdicts in favor of defendants. On defendants' counterclaims, it found

that Life Care's management of competing facilities was a breach of its fiduciary duties, and awarded defendants $6 million for this breach. App. 1a. East Hampden's actual damages were largely, if not wholly, based on its expert's projections of East Hampden's future damages, rather than on damages flowing from competition that had already occurred.

The jury also awarded defendants $6 million in exemplary damages based on this breach, App. 1a, which appears to be the largest amount ever awarded for punitive damages in a Colorado fiduciary-breach case, and the second-largest punitive award ever upheld by the Colorado appellate courts. The $6 million punitive award was the maximum that the jury could have awarded in light of Colorado law prohibiting punitive awards from exceeding the amount of compensatory damages awarded. *Id.* The award at the time also constituted almost 21% of Life Care's $29 million net worth. *See id.* at 15a.

After trial, Life Care moved for judgment n.o.v. on, or a remittitur of, the punitive damages award, *inter alia*, on the ground that the punitive exaction violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Life Care's motion was summarily denied in a one-sentence order: "Plaintiffs' Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial is denied." App. 19a.

On appeal to the Colorado Court of Appeals, Life Care again challenged the punitive award under the Due Process Clause of the Fourteenth Amendment. First, citing *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), Life Care urged the court of appeals that "[a] close appellate review" was necessary in order to satisfy Due Process. (Pl. - Appellants' Br. at 35). Life Care then urged that, in order to comport with Due Process, and with Colorado law, several objective factors required a reduction or elimination of the punitive award: the closeness of the case on the law and facts; the disproportionately large percentage of Life Care's net worth that the damages awards constituted; and the sufficiency of the actual damages award to

serve the goals of punishment and deterrence. (*Id.* at 45-46). East Hampden, quoting *Soneff v. Harlan*, 712 P.2d 1084, 1087-88 (Colo. Ct. App. 1985), opposed by arguing that the jury's determination of punitive damages should not be disturbed "absent a clear abuse of discretion." (Def.-Appellees' Br. at 38 (Colo. App. Feb. 14, 1994)). Life Care also showed that, although Colorado case law had never before addressed this issue, the case law of other states, agency scholars, and the Restatement (Second) of Agency were all uniform in concluding that a nonexclusive agent such as Life Care does not, as a matter of law, breach a fiduciary duty by representing competitors.[4] (Pl. - Appellants' Br. at 12-17).

The court of appeals rejected Life Care's contention that a nonexclusive agent is entitled to manage competitors as a matter

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[4] The case law to this effect includes *Martin Pincus Mktg. v. Sawyer of Napa, Inc.*, 774 F. Supp. 171 (S.D.N.Y. 1991); *R.G. Nelson, A.I.A. v. M.L. Steer*, 797 P.2d 117 (Idaho 1990); *Coldwell Banker Commercial Group, Inc. v. Camelback Office Park*, 751 P.2d 542 (Ariz. 1988); *McEvoy v. Ginsberg*, 189 N.E.2d 546 (Mass. 1963); *Raycarr Sales Corp. v. Herman Rynveld's Son Corp.*, 147 N.Y.S.2d 425 (Sup. Ct. 1955), *rev'd on other grounds*, 150 N.Y.S.2d 619 (App. Div. 1956); *Foley v. Mathias*, 233 N.W. 106 (Iowa 1930); *Clark-Rice Corp. v. Waltham Bleachery & Dye Works*, 166 N.E. 867 (Mass. 1929); *Thompson v. Ferguson & Turnley*, 250 S.W. 204 (Tex. Civ. App. 1923); *Lemon v. Macklem*, 122 N.W. 77 (Mich. 1909); *Butterick Pub. Co. v. Boynton*, 77 N.E. 705 (Mass. 1906); *McGeehan v. Gaar, Scott & Co.*, 100 N.W. 1072 (Wis. 1904); *Hirshhorn v. Bradley*, 90 N.W. 592 (Iowa 1902); and *Gaty v. Sack*, 19 Mo. App. 470 (1885). The commentators include *Seavey on Agency* § 151, at 248 (1964); *Sell on Agency* § 135, at 122 (1975); 1 *Mechem on Agency* § 1232, at 903 (1914); and 12 Am. Jur. 2d, *Brokers* § 87, at 841 (1964). These authorities follow the rule outlined in Restatement (Second) of Agency § 394 & cmt. b (1958). *See also Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1374 (7th Cir. 1990) (Posner, J.) ("declin[ing] the invitation to recast hotel contract managers as trustees or guardians of the hotel owners" except when the manager exercises a "traditional fiduciary role, such as the management of bank accounts").

of law. Instead, the court held that to be a jury question dependent entirely on the facts of each case. App. 3a-4a. The court of appeals thus held that there was sufficient evidence to affirm the jury's verdict that Life Care had breached its duty by managing competitors. App. 4a. The court of appeals also affirmed the jury's $6 million exemplary damages verdict as proper under Colorado law, applying the deferential standard of review announced in *Frick v. Abell*, 602 P.2d 852, 854 (Colo. 1979).[5] This holding was based on three pieces of evidence: One, Life Care had competed by seeking new residents for the retirement village from the nursing home; two, Life Care had recommended that the nursing home convert its assisted-living unit to a skilled nursing unit, which would have eliminated the nursing home's competition for assisted-living residents with the retirement village; and three, the Alzheimer's center "competed with Cherry Creek Nursing for patients." App. 14a.

As for Life Care's argument that the award violated the Due Process Clause, the court of appeals seemed to be of the view that any punitive damage award which fell within Colorado's statutory cap (*i.e.*, punitive damages may not exceed actual damages) was *per se* constitutional. App. 15a. The Court's analysis of Life Care's Due Process challenge was but this:

> Life Care argues that the exemplary damages, which it states are in excess of 10% [*sic*; 20%] of its net worth, constitute a disproportionately large percentage of its net worth. We conclude that the award here, which was limited to an amount equal to the compensatory damages awarded on East Hampden's breach of fiduciary duties claim, does not violate the Due Process Clause of the United States Constitution. *See Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111

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[5] "In reviewing an award of exemplary damages, we must determine 'whether there was sufficient evidence, when viewed in its totality and in the light most supportive of the verdict, to support the jury's finding . . . .' *Frick v. Abell*, 198 Colo. 508, 511, 602 P.2d 852, 854 (1979)." App. 13a.

S. Ct. 1032, 113 L.Ed.2d 1 (1991); *Palmer v. A.H. Robins Co.*, [684 P.2d 187 (Colo. 1984)].

App. 15a. The court thus dismissed the relevance of Life Care's net worth, and it did not even mention Life Care's argument that the closeness of the case (including the novelty of such an award under Colorado law and the law of other states) merited a reduction or elimination of the exemplary award.[6]

Life Care renewed its Due Process challenges in a petition for rehearing in the court of appeals. The court of appeals denied rehearing without opinion.

Life Care petitioned the Colorado Supreme Court for certiorari review, again raising Due Process objections. Review was denied without opinion, Justice Mullarkey dissenting. App. 17a. Justice Mullarkey would have granted certiorari to consider both the fiduciary-duty issue, as well as the question of "[w]hether the court of appeals['] affirmance of the jury's exemplary damages award of $6 million violated Colorado law and due process protections." App. 18a.

REASONS FOR GRANTING THE WRIT

The $6 million in punitive damages awarded by the jury — and affirmed by the trial court and court of appeals — is, to petitioners' knowledge, the second largest such award ever upheld by a Colorado court. The largest such award came in a products liability case against a major manufacturer of drugs and medical devices, and was only $200,000 larger. *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984). *Palmer* was litigated and appealed before Colorado passed its statutory cap on punitive damages, Colo. Rev. Stat. § 13-21-102(1)(a), which limits a jury's award of punitive damages to the amount of compensatory

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[6] On two issues — Life Care's liability on an unrelated counterclaim, and the proper calculation of prejudgment interest — the court of appeals reversed and remanded for further computations in the trial court. App. 15a-16a.

damages, and which the court of appeals here apparently viewed as making close appellate review unnecessary.[7] The $6 million award here is also, to petitioner's knowledge, the largest amount ever awarded, in any state. for a breach of fiduciary duty outside of the insurance context. *See* Jane Massey Draper, *Excessiveness or Inadequacy of Punitive Damages in Cases Not Involving Personal Injury or Death*, 14 A.L.R.5th 242, at §§ 8-16 (1993) (listing awards).

Despite the unusual and enormous nature of this award, the decision below fails to disclose what, if any, analysis led the court of appeals to sustain this award other than the statutory limit on punitive damages to the amount of compensatory damages. Because the Due Process Clause requires more meaningful analysis than the Colorado Court of Appeals gave, and because this case presents important and recurring questions concerning the standards for reviewing punitive damage awards, this case merits review. In the alternative, because this case raises many of the same issues as *BMW of North America, Inc. v. Gore*, No. 94-896 (argued Oct. 11, 1995), this petition should be held pending the decision in that case.

I. THE DECISION BELOW, WHICH FAILED TO CONSIDER THE OBJECTIVE FACTORS OF CLOSENESS OF THE CASE AND PETITIONER'S NET WORTH, CONFLICTS WITH THIS COURT'S *HONDA* AND *HASLIP* DECISIONS AND WITH THE DECISIONS OF OTHER COURTS.

This Court has considered the problem of arbitrarily excessive punitive damages awards three times in the last five years. *See Honda Motor Co. Ltd. v. Oberg*, 114 S. Ct. 2331 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711

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[7] In *Palmer* the punitive award was over ten times the amount of compensatory damages. Had *Palmer* been subject to that statutory cap, the jury's $6.2 million award would have been reduced to $600,000, the amount of compensatory damages awarded in that case. 684 P.2d at 198.

(1993); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). While these decisions have not yet resolved the "difficult question of what standard of review is constitutionally required," *Honda*, 114 S. Ct. at 2341 n.10, they have plainly established a guiding principle: To protect against arbitrary and excessive punitive damages, such awards must receive meaningful review on appeal. *See id.* at 2338-41; *TXO*, 113 S. Ct. at 2720 (plurality opinion); *Haslip*, 499 U.S. at 20. Nevertheless, the Colorado Court of Appeals in this case did not conduct any meaningful appellate review of the $6 million in punitive damages imposed upon Life Care.

Nothing in the record below suggests that the size of the punitive damages award in this case received meaningful appellate review. The entire discussion of this question is contained in a single, terse paragraph, which failed to address either of the objective factors urged by Life Care — the closeness of the case and the impact of the award on Life Care's net worth.[8] Instead, the court below simply declared:

> We conclude that the award here, which was limited to an amount equal to the compensatory damages awarded on East Hampden's breach of fiduciary duties claim, does not violate the Due Process Clause of the United States Constitution. *See Pacific Mutual Life Insurance Co. v. Haslip*, [499 U.S. 1 (1991)]; *Palmer v. A.H. Robbins Co., Inc.*, [684 P.2d 187 (Colo. 1984)].

App. 15a. At best, the decision below seems to have rejected petitioner's Due Process challenge based wholly upon the statutorily required one-to-one ratio between punitive and compensatory damages — an inquiry which this Court and lower courts have repeatedly "eschewed" as a *sine qua non* under the Due Process Clause. *TXO*, 113 S. Ct. at 2721. The court did

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[8] The court below adverted to Life Care's contention that the award constitutes a disproportionate percentage of petitioner's net worth. It did not even mention the closeness of the case argument against the award.

not even advert to the closeness of the case on the law and facts, including the fact that established norms — as represented in the uniformity of other states' decisional law — allowed nonexclusive agents to compete. Nor did the court below explain why a $6 million punitive award, against a company worth only $29 million at that time, was necessary or appropriate to serve the State of Colorado's interests in punishment and deterrence. *See, e.g.*, *Orijas v. Stevenson*, 31 F.3d 995, 1013 (10th Cir. 1994) (identifying the purposes of punitive damages under Colorado law).

By failing to consider either the closeness of the decision below on the merits or the inordinate percentage of petitioner's net worth the punitive damages award would constitute, the decision below brings Colorado into conflict with numerous other lower court decisions.

A. The Lower Courts Are In Conflict As To Whether The Closeness Of The Case And Defendants' Net Worth Must Be Considered.

1. Closeness of the Case. Several lower courts have recognized that a defendant's notice of the illegality of his conduct is an important factor in assessing the proper amount of punitive damages to impose — where the question of liability is "close" on the law and facts, a defendant cannot be said to have had notice that the conduct in question was impermissible. Indeed, this Court in *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482 (1915), found a penalty excessive and violative of Due Process because the conduct being punished "had the support of repeated adjudications in other jurisdictions." *Id.* at 491. This lack of notice made the penalties "so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law." *Id.*[9] And the Court of Appeals

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[9] Moreover, many courts have held that a defendant's compliance with industry standards or customs either limits or prohibits entirely the award of punitive damages. *See, e.g.*, *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 902

for the Federal Circuit, although its docket does not include "traditional" punitive damages cases, has recognized the importance of the "[c]loseness of the case" in its multifactor analysis for reviewing awards of enhanced damages under the patent laws, 35 U.S.C. § 284. *Read Corp. v. Portec, Inc.*, 970 F.2d 816, 827 (Fed. Cir. 1992).[10] The Due Process Clause prohibits punishing an individual for conduct absent notice of "sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see generally Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

In this case, the question of liability was plainly a close one. No Colorado statute or judicial decision prior to this case prohibited a non-exclusive agent from managing facilities owned by competitors of its principal. The commentators and courts in other jurisdictions to have considered the question all agreed that a non-exclusive agent may, as a matter of law, represent competitors of its principal absent an express contractual prohibition. *See supra* p. 6 n. 4.

Thus, not only did Life Care, like the defendant in *Danaher*, act in accordance with the law of most jurisdictions, it also acted in accord with all authority existing at the time of its conduct.

(1995); *Drabeck v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993); *Alley v. Gubser Dev. Co.*, 785 F.2d 849, 856 (10th Cir.), *cert. denied*, 479 U.S. 961 (1986); *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1378 (5th Cir. 1982) (en banc).

[10] Section 284 of Title 35, United States Code, allows the court in cases of patent infringement to "increase the damages up to three times the amount found or assessed" in certain circumstances, particularly those where the infringement is found to be "willful." The Federal Circuit in *Read Corp.* crafted its § 284 analysis to make it "in line with punitive damage considerations in other tort contexts." 970 F.2d at 827-28. That court also held that lower courts are "obligated to explain the basis for the award, particularly where the maximum amount is imposed." *Id.* at 828.

While punitive damages may be appropriate where "prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct," *TXO*, 113 S. Ct. at 2724 (citation omitted), they are improper where, as here, there is not even a hint that the conduct in question was "tortious." Thus, in this case, not only is the punitive damages award excessive because the question of liability was a close one, but also anything more than a nominal award would be improper because petitioner lacked any notice that its actions would be subject to punishment. *See, e.g., Kolender*, 461 U.S. at 358. Nevertheless, there is no indication that the court below even considered the closeness of the case on liability in affirming the $6 million punitive damages award in this case.

This same issue is present in *BMW*. At issue in *BMW* is the propriety of the company's policy of not disclosing repairs costing less than 3% of a vehicles manufacturer's suggested retail price. *See BMW of North America, Inc. v. Gore*, 646 So.2d 619, 621 (Ala. 1994). Before this Court, BMW has argued, *inter alia*, that it "had no notice that Alabama would consider its application of the 3% disclosure threshold to be punishable misconduct." Brief of Petitioner at 39, *BMW of North America, Inc. v. Gore* (U.S. March 23, 1995) (No. 94-896). In addition, as here, BMW relied upon the fact that the case was a close one because other states had explicitly found its conduct to be permissible. *See id.* at 39 & n.24. Thus, like this case, *BMW* presents the question whether a defendant's conduct is "objectively less reprehensible if the [conduct is] approved in other states." *Id.* at 37.

2. Net Worth. This case also presents the question whether the excessiveness of a punitive damage award should be judged in relation to a defendant's net worth. The $6 million punitive award in this case represented roughly 21% of Life Care's then-net worth of $29 million, yet there is no indication that the court of appeals considered this factor. Instead, it relied solely on Colorado's statutorily required one-to-one limitation of compensatory to punitive damages to dispose of Life Care's Due Process argument.

Net worth is nearly universally recognized as an important factor in determining the appropriate size of a punitive damages award. *See TXO*, 113 S. Ct. at 2722 & n.28 (calling it "well-settled law" that the defendant's financial position is "typically considered"); *Haslip*, 499 U.S. at 21-22. Without that contextual information, a court cannot determine "whether a particular award is greater than reasonably necessary to punish and deter." *Id.* at 22.[11] *See generally Lunsford v. Morris*, 746 S.W.2d 471, 472 & n.2 (Tex. 1988) (noting that 43 states consider a defendant's net worth as a relevant factor in determining the proper amount of punitive damages); *see generally* 1 James D. Ghiardi & John J. Kircher, *Punitive Damages Law & Practice* § 5.36, at 47 (1995) (observing this to be the general rule).[12] Accordingly, courts have held that failure to consider a defendant's net worth would raise serious constitutional concerns, because net worth is necessary to provide a context for evaluating the rationality of a punitive exaction. *See, e.g., Adams v. Murikami*, 813 P.2d 1348, 1352 (Cal. 1991) (en banc); *see also Fraidin v. Weitzman*, 611 A.2d 1046, 1070 (Md. Ct. Spec. App. 1992) (finding punitive damage awards unconstitutional because excessive in relation to defendant's net worth). By failing to consider this factor, the court below departed radically from normal analysis of punitive damages, thereby presenting yet another issue worthy of this Court's review.

Indeed, comparing the punitive award to the defendant's net worth is an even more meaningful comparison than comparing the

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[11] The twin purposes of punitive damages are to "punish for a past event and to prevent future offenses, and the degree of punishment or deterrence resulting from a judgment is to some extent in proportion to the means of the guilty person." Restatement (Second) of Torts § 908, cmt. e (1979).

[12] The percentage of an individual's net worth that would be consumed by a punitive damages award is also significant because the purpose of punitive damages is to punish and deter a defendant, "not to drain . . . his life's blood." *Hollins v. Powell*, 773 F.2d 191, 198 (8th Cir. 1985).

punitive award to the compensatory award. The defendant's net worth must be considered by the court in order to meaningfully evaluate whether a particular punitive award "is greater than reasonably necessary to punish and deter." *Haslip*, 499 U.S. at 22. Even where the same actual damages are caused by two different defendants, the differences in their net worth may require different punitive awards. A punitive award of $6 million on top of an actual damages award of $6 million may not be sufficient to punish and deter a Fortune 500 corporation; but the same awards, if levied against a corporation worth only $29 million, is far "greater than reasonably necessary to punish and deter" except perhaps in the most extraordinary cases.

The typical ratio of punitive damages to a defendant's net worth is around one percent. *See Dunn v. Hovic*, 1 F.3d 1371, 1383 (3d Cir. 1993); *Cash v. Beltman North American Co.*, 900 F.2d 109, 111 n.3 (7th Cir. 1990); Michael Rustaad & Thomas Koenig, *The Historical Continuity of Punitive Damage Awards: Reforming the Tort Reformers*, 42 Am. L. Rev. 1269, 1314 (1993). At the time of the jury's verdict, the award constituted more than 20% of petitioner's net worth. *See supra* p. 5. Given the State's unusually limited interest in both punishment and deterrence in this case, it is plain that the $6 million in punitive damages imposed below is grossly excessive.

B. The Lower Courts Are In Conflict As To Whether "Passion-and-Prejudice" Appellate Review Is Constitutionally Adequate.

The court of appeals here rejected the close appellate review required by *Honda* and *Haslip*, and instead applied Colorado's "passion-and-prejudice" standard of review of punitive damage awards. The lower courts are also divided over whether that sort of review is constitutionally adequate.

Under Colorado law, courts reviewing punitive damages awards are not required to inquire "whether a particular award is greater than reasonably necessary to punish and deter." *Haslip*, 499 U.S. at 22. The Colorado code makes that inquiry discretionary. *See* Colo. Rev. Stat. § 13-21-102(2) (providing

that "the court *may* reduce or disallow the award of exemplary damages to the extent that . . . [t]he purpose of such award has otherwise been served") (emphasis added). The only mandatory inquiry under Colorado law, established long before this Court's decision in *Haslip*, is "whether the punitive damages are so excessive that they shock the judicial conscience or lead to an inescapable inference that they resulted from improper passion or prejudice on the part of the jury." *Orijas v. Stevenson*, 31 F.3d at 1013. *See also Palmer*, 684 P.2d at 220; *Frick v. Abell*, 602 P.2d 852, 854 (Colo. 1979). Under that inquiry, the reasonableness of an award is evaluated simply by "examining the facts of the case to discover if the jury was impermissibly motivated by prejudice or properly guided by the purposes for exemplary damages." *Frick v. Abell*, 602 P.2d at 854. Furthermore, appellate review is limited to determining whether the district court abused its discretion. *See Orijas*, 31 F.3d at 1013; *Frick*, 602 P.2d at 854.

The lower courts are divided over the adequacy of this sort of "passion-and-prejudice" review. The Fourth Circuit has explicitly found such review constitutionally inadequate. In *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), the Fourth Circuit considered South Carolina's procedures for awarding punitive damages which, like Colorado's, permitted appellate courts to reverse an award only when that award was so "shockingly excessive" as to show that the jury was motivated by passion or prejudice. *See id.* at 100-06. The Fourth Circuit found that this procedure left the jury to "its own devices to take property or mete out punishment to whatever extent it feels is best" and therefore "violates the first principle of due process." *Id.* at 105. In so doing, the Fourth Circuit observed that in *Haslip* this Court distinguished Alabama's detailed standards of review from Vermont's and Mississippi's review procedures, which permitted a punitive damages award to be set aside only if it was "'manifestly and grossly excessive' or would be considered excessive when 'it evinces passion, bias and prejudice on the party of the jury so as to shock the conscience.'" *Id.* (citations and internal quotations omitted). *See also Haslip*, 499 U.S. at 21

n.10).

The West Virginia Supreme Court of Appeals has reached a similar conclusion. Before *Haslip*, that court applied a passion-and-prejudice standard of review. *See Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 908 (W. Va. 1991). However, after *Haslip*, it recognized that such review was inadequate and adopted procedures for appellate review similar to those approved in *Haslip*. *See id.* at 908-10. *See also Alexander & Alexander, Inc. v. B. Dixon Evander & Associates*, 596 A.2d 687, 709-11 (Md. Ct. Spec. App. 1991) (rejecting an abuse-of-discretion standard of review as inconsistent with *Haslip*).

At least two courts of appeals have, however, explicitly found that passion-and-prejudice review is consistent with *Haslip* and with Due Process. In *Eichenseer v. Reserve Life Insurance Co.*, 934 F.2d 1377 (5th Cir. 1991), the Fifth Circuit considered a Mississippi procedure which permitted appellate courts to set aside a punitive damages award only if "it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience." 934 F.2d at 1386 (quotation omitted). In light of the "vigorous examination of the appropriateness of punitive damages" at the district court level, the Fifth Circuit found the narrow review applied on appeal to be constitutionally adequate. *Id.*; *see also Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1098 (5th Cir. 1991) ("We reject Celotex's implication that a 'passion and prejudice' standard of review can never withstand constitutional scrutiny after *Haslip*.") (citation omitted). Following these Fifth Circuit precedents, the Eighth Circuit has also rejected the "contention that a 'passion and prejudice' standard of review cannot satisfy constitutional due process requirements." *Latham Seed Co. v. Nickerson American Plant Breeders, Inc.*, 978 F.2d 1493, 1501 (8th Cir. 1992).[13]

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[13] The Ninth Circuit has also approved appellate review that is nominally directed at passion and prejudice; however, it approved that California standard of review because it, in fact, affords "the same general degree of scrutiny as found in the Alabama review process" — it considers the

Thus, by rejecting Life Care's contention that *Haslip* requires a "close appellate review" of the size of punitive damages award and instead applying, albeit implicitly, Colorado's passion-and-prejudice standard, the decision below deepens the conflict over an issue that already divides the lower courts.

II. THE DECISION BELOW, IN FAILING TO ARTICULATE ANY RATIONAL BASIS FOR THE PUNITIVE EXACTION, IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS

This Court has explicitly refused to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable" in *Haslip*, one of the very cases cited by the court below. *See* 499 U.S. at 18. Instead, this Court, in *Haslip*, *TXO*, and *Honda*, has repeatedly stressed that the procedural aspects of the Due Process Clause, not bright-line substantive rules, are the primary bulwark against arbitrary and unreasonable punitive damages. *Honda*, 114 S. Ct. at 2335; *TXO*, 113 S. Ct. at 2720; *Haslip*, 499 U.S. at 20.

In all three cases, this Court has emphasized the criticality of close appellate review on appeal. In *Haslip*, this Court upheld Alabama's system for awarding punitive damages because it constrained the discretion of juries through jury instructions, meaningful post-trial review at the trial court level, and appellate review applying detailed substantive standards. *See* 499 U.S. at 19-22. Such vigorous appellate review, this Court found, "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders" and "makes certain that punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Id.* at 20-22. In *TXO*, the plurality found the fact

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same factors as does the jury, and evaluates those factors in light of the policies of punishment and deterrence. *Boyle v. Lorimar Prod., Inc.*, 13 F.3d 1357, 1360 (9th Cir. 1994) (quotation omitted).

that the "award was reviewed and upheld by the trial judge" and affirmed on appeal gave rise "to a strong presumption of validity." *TXO*, 113 S. Ct. at 2720. *See also id.* at 2741-42 (O'Connor, J., joined by White and Souter, JJ., dissenting). And in *Honda*, this Court found that such appellate review of the size of punitive damages awards is a necessary component of due process. *See Honda*, 114 S. Ct. at 2339-42.[14]

To implement this requirement of close appellate review, many state appellate courts have required their trial courts to issue reasoned explanations for upholding punitive awards. *E.g.*, *Sprague v. Walter*, 656 A.2d 890, 928 (Pa. Super. Ct. 1995); *Gamble v. Stevenson*, 406 S.E.2d 350, 354 (S.C. 1991); *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d at 909-10. The principal reason for imposing this requirement is to aid the appellate court in conducting its close appellate review — the same reason that this Court requires district courts, in the context of attorneys' fee awards, "to provide a concise but clear explanation of its reasons for the fee award." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). *See also* Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 770 (1982).[15]

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[14] At issue in *Honda* was Oregon's system for awarding punitive damages. Under that system, the safeguards against excessive verdicts were almost entirely at the trial level. Although appellate review was limited to determining whether the evidence was sufficient to support any award of punitive damages, at the trial level punitive damages were limited to a maximum allowable amount, detailed jury instructions given, and clear and convincing evidence required. *See Honda*, 114 S. Ct. at 2341. Nevertheless, finding that juries could ignore these safeguards, this Court held that "Oregon's denial of judicial review of the size of punitive damage awards violates the Due Process Clause of the Fourteenth Amendment." *Id.* (footnote omitted).

[15] The same requirement of a reasoned explanation is found in other contexts as well. When a district court certifies a partial final judgment under Fed. R. Civ. P. 54(b), most appellate courts require a "brief, reasoned statement in support of [the trial court's] determination that 'there is no just reason for delay'" in entering the partial final judgment.

Where the trial court, as here, does not issue any reasons for its decision, the close appellate review is particularly important. In *TXO*, the plurality found that close review in the West Virginia Supreme Court of Appeals' "thorough opinion," 113 S. Ct. at 2724, which carefully analyzed the "reasonable relationship" between the award and the goals of punitive damages, *id.* at 2717-18, "and gave careful attention to the relevant precedents." *Id.* at 2724.

But here, unlike in *TXO*, the appellate court did not conduct anything resembling a "thorough," "careful" appellate review, even though the trial court had not itself conducted a close post-trial review. There is no indication that the Colorado Court of Appeals even attempted to assess whether the punitive damages awarded in this case were reasonable in amount and rational in light of their purposes. Instead, it relied solely upon Colorado's one-to-one limit upon the ratio of punitive to compensatory damages. *See* Colo. Rev. Stat. § 13-21-102(1)(a) (generally limiting punitive damages to the amount of actual damages); *see also id.* § 13-21-102(3) (permitting courts, not juries, to increase punitive damages up to three times compensatory damages in certain cases where aggravating circumstances are present). This, however, is not enough to save every Colorado punitive damage award from unconstitutionality, as the court of appeals here apparently believed.[16] As the procedures utilized below did not

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See, e.g., Gumer v. Shearson, Hammill & Co., 516 F.2d 283, 286 (2d Cir. 1974). And in administrative law, because an agency's determination may only be upheld on the strength of the agency's own rationale, the agency must reveal enough of its own reasoning to permit meaningful judicial review. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943); *Schaffer Transp. Co. v. United States*, 355 U.S. 83 (1957).

[16] The Oregon system found unconstitutional in *Honda* also included a "pre-verdict determination of the maximum allowable punitive damages." *Honda*, 114 S. Ct. at 2341. Nonetheless, because Oregon did not provide for meaningful appellate review of the reasonableness of the amount of punitive damages awarded by the jury, this Court found the Oregon system violative of due process.

provide the close appellate review required by this Court's decisions, the decision below directly conflicts with *TXO*, *Honda* and *Haslip*.

The court of appeals' refusal to provide the close appellate review required by the Due Process Clause also conflicts with the approaches of numerous other courts. In *Sprague v. Walter*, the appellate court, citing *Honda*, held that "the trial and appellate courts of the various states must provide meaningful review of the amount of punitive damages awarded by the jury in any given case." 656 A.2d at 928. In *Garnes v. Fleming Landfill, Inc.*, the West Virginia Supreme Court of Appeals held that its review of punitive damages awards would "consider the same [nine] factors that we require the jury and trial judge to consider." 413 S.E.2d at 910. And in *Ezzone v. Riccardi*, 525 N.W.2d 388 (Iowa 1994), the Supreme Court of Iowa, citing *Honda*, held that "appellate review of the appropriateness of the amount" of punitive damages is required by the Due Process Clause. *Id.* at 398-99. The conflict of these decisions with the approach of the court of appeals in this case provides additional reasons for certiorari review.

There are, moreover, good reasons for requiring meaningful appellate review. Absent an articulation of the rationale behind a punitive award, courts would be free to uphold such awards based upon impermissible reasons — or, as appears to be the case here, no legitimate reasons whatsoever. A statement of reasons also has a disciplining effect on courts: "A decisionmaker obliged to give reasons to support his decision may find they do not; 'the opinion will not write.'" *Arlinghaus v. Ritenour*, 543 F.2d 461, 464 (2d Cir. 1976) (per curiam). Reasoned explanation will also legitimize large punitive exactions in the public eye. But here, the only explanation that Life Care, or the public, has been given for the assessment of this $6 million punitive award is the brief statement of the court of appeals that Life Care has no ground for complaint because the punitive damages did not exceed the compensatory damages. That is barely "process," let alone Due Process.

This problem is endemic. As Justice O'Connor pointed out in her dissenting opinion in *TXO*, "[a]mici recite case after case in which review has been inadequate or absent altogether." *TXO*, 113 S.Ct. at 2742 (O'Connor, J., joined by White and Souter, JJ., dissenting) (citing Brief for Phillips Petroleum Co., *et al.* as *Amici Curiae* at 20-27, *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993) (No. 92-479)).

Indeed, a nearly identical issue is presented by the decision being reviewed in *BMW of North America, Inc. v. Gore*, No. 94-896. In that case, like here, the Alabama Supreme Court approved a $2 million punitive damages award without offering any explanation for the size of the award. *See BMW of North America, Inc. v. Gore*, 646 So.2d at 629 (stating only that "we hold that a constitutionally reasonable punitive damages award in this case is $2,000,000"). Thus, because *BMW* raises the question whether there is an obligation on the part of state appellate courts to explain the size of a punitive damages award, this case should at a minimum be held for the decision in *BMW*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. In the alternative, this petition should be held pending decision in *BMW of North America, Inc. v. Gore*.

Respectfully submitted,

TIMOTHY B. DYK
(Counsel of Record)
GREGORY A. CASTANIAS
DANIEL H. BROMBERG
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, DC 20005-2088
(202) 879-3939

JEAN E. DUBOFSKY
JEAN E. DUBOFSKY, P.C.
Canyon Center Building
1881 9th Street, Suite 210
Boulder, Colorado 80302
(303) 447-3510

Counsel for Petitioners

December 29, 1995

APPENDIX

COLORADO COURT OF APPEALS,
DIV. II.

LIFE CARE CENTERS OF AMERICA, INC. and American Lifestyles, Inc.,

Plaintiffs-Appellants and Cross-Appellees,

v.

EAST HAMPDEN ASSOCIATES LIMITED PARTNERSHIP, Cheyenne Associates Limited Partnership, John W. Galston, Eugene H. Rosen, Bruce Weinstein, LPIMC, Inc., and Integon Life Insurance Corporation,

Defendants-Appellees and Cross-Appellants.

Nos. 93CA0222, 93CA0581.

March 23, 1995.

Opinion by Judge PLANK.

Plaintiffs, Life Care Centers of America, Inc., and American Lifestyles, Inc., (collectively, Life Care) appeal the judgment entered on a jury verdict awarding $6 million to East Hampden Associates Limited Partnership (East Hampden) on its breach of fiduciary duties counterclaim, $2 million on its breach of contract counterclaim, $6 million in punitive damages, and the trial court's award of more than $2.1 million in prejudgment interest to East Hampden. Life Care also appeals the jury's rejection of its breach of contract claim against East Hampden, Cheyenne Associates Limited Partnership (Cheyenne), LPIMC, Inc., the general partner of East Hampden and Cheyenne, and the officers of LPIMC, John W. Galston, Eugene H. Rosen, and Bruce Weinstein. We affirm in part, reverse in part, and remand with directions.

In 1987, East Hampden purchased a nursing home, Cherry Creek Nursing Center (Cherry Creek Nursing). At that time, Cherry Creek Nursing primarily offered skilled nursing care but also provided assisted living services and specialized care for persons suffering from Alzheimer's disease. One of East

Hampden's predecessors in interest had contracted with Life Care to manage Cherry Creek Nursing, and Life Care continued to manage the facility after it was purchased by East Hampden. Pursuant to this management agreement, Life Care was responsible for the day-to-day operations of Cherry Creek Nursing.

Life Care was also the managing agent for Cheyenne Place Retirement Center (Cheyenne Place) and the Cheyenne Mountain Nursing Center (Cheyenne Nursing), which were owned by Cheyenne. Cheyenne Place offered an independent living environment for retired persons and Cheyenne Nursing offered assisted living services and skilled nursing care.

During Life Care's management of Cherry Creek Nursing, Life Care's chairman of the board and sole shareholder, Forrest Preston, helped develop two facilities, Cherry Creek Retirement Village (CCRV) and Garden Terrace, in which he had an ownership interest. Life Care was also retained as the managing agent for both of these facilities. CCRV was constructed on land adjacent to Cherry Creek Nursing and offered assisted living services and independent retirement living. Garden Terrace was located a few miles from Cherry Creek Nursing and specialized in the treatment of Alzheimer's disease.

In April 1991, East Hampden terminated its contract with Life Care based on its conclusion that Life Care had fiscally mismanaged Cherry Creek Nursing and had misappropriated key business opportunities by its operation of CCRV and Garden Terrace. In addition, Cheyenne terminated its relationship with Life Care with respect to the two facilities it owned.

Life Care initiated this action against both East Hampden and Cheyenne for breach of contract. East Hampden and Cheyenne filed counterclaims against Life Care for breach of its fiduciary duties and East Hampden filed a counterclaim for breach of contract based on Life Care's failure to maximize Medicare reimbursement and its failure to seek Medicaid certification for Cherry Creek Nursing. After an 11-day trial, the jury found

against Life Care on its breach of contract claims and in favor of East Hampden and Cheyenne on their counterclaims.

I.

Life Care contends that its management of other long-term care facilities in the Denver area was not, as a matter of law, a breach of its fiduciary duties to East Hampden. We are not persuaded.

A.

The relationship between Life Care and East Hampden was governed by the management agreement that East Hampden's predecessor in interest had entered into with Life Care. This agreement provided that Life Care was to be the agent of the owner of Cherry Creek Nursing. Furthermore, at trial, Preston testified that Life Care was an agent of East Hampden and that Life Care owed East Hampden duties of trust, loyalty, honesty, a duty to look after the best interests of East Hampden, and a duty to maximize the profits of Cherry Creek Nursing.

Life Care tendered an instruction, given to the jury, based on *Restatement (Second) of Agency* § 393 (1958). This instruction provided:

> It is a breach of fiduciary duty to compete with [the] principal with respect to the subject matter of the agency unless the principal understands that the agent is to compete or a course of dealing between the agent and the principal indicate that this is understood.

B.

Initially, we reject Life Care's contention that it did not breach its fiduciary duties to East Hampden because it was not East Hampden's exclusive agent.

Life Care relies on *Restatement (Second) of Agency* § 394 comment b (1958) which provides:

> The agent commits no breach of duty by acting for competitors if, at the time of his employment, the principals have reason to know that the agent believes that he is privileged to do so.

Life Care further asserts that the following illustration, set out that *Restatement* comment, is on "all fours" with this case:

> P, a manufacturing company, enters into a contract with A, another corporation, the business of which is representing manufacturers. By terms of the contract A is to have the exclusive agency to sell P's products. A makes other similar contracts with competing manufacturers. In the absence of further facts, A thereby commits no breach of duty to P.

Life Care did not submit an instruction based on these authorities to the trial court. Moreover, as these authorities make clear, the determination of the nature and scope of an agency relationship is inherently factual.

The evidence concerning the relationship between East Hampden and Life Care was extensive and at times conflicting. The mere fact that East Hampden may have known that Life Care operated other health care facilities in the Denver area was not dispositive as to whether Life Care breached its fiduciary duties to East Hampden. Life Care could have operated other long-term care facilities in the Denver area in such a manner that it did not breach these duties.

Therefore, under these circumstances we cannot determine, as a matter of law, that Life Care did not breach its fiduciary duties to East Hampden.

C.

Next, we reject Life Care's argument that it did not breach its fiduciary duties to East Hampden because East Hampden consented to the competition.

The evidence concerning what East Hampden knew and whether it had consented to Preston's development of CCRV and Garden Terrace and Life Care's management of these facilities

was disputed. The jury, in concluding that Life Care breached its fiduciary duties to East Hampden, implicitly rejected Life Care's arguments that East Hampden had agreed to or consented to Life Care's management of CCRV and Garden Terrace. The jury's conclusion is supported by the record and, accordingly, will not be disturbed on appeal. *See Nutting v. Northern Energy, Inc.*, 874 P.2d 482 (Colo.App. 1994).

D.

We also reject Life Care's contention that the trial court erred in failing to instruct the jury, as an affirmative defense to East Hampden's breach of fiduciary duties counterclaim, that there was an understanding or a course of dealing between the "original owner" of Cherry Creek Nursing and Life Care that Life Care could manage "other facilities" in Denver.

The instruction tendered by Life Care was based on *Restatement (Second) of Agency* § 393 comment a (1958) which provides that:

> There is no violation of the agent's duty if the principal understands that the agent is to compete; a course of dealing between the parties may indicate that this is understood.

In rejecting Life Care's tendered instruction, the trial court stated that:

> This is not a course of dealing case. It's a case about notice and estoppel, and that's the way it's been tried and that's the way it will be presented to the jury.

We agree that the trial court properly rejected Life Care's tendered instruction as it was incorporated in other instructions given by the court. The trial court, as noted previously, gave Life Care's tendered instruction that an agent does not breach its fiduciary duties if the agent competes with the principal and "the principal understands that the agent is to compete or a course of dealing between the agent and the principal indicate that this is understood." (emphasis added) The jury was also instructed that: "One who is assigned the rights under a contract stands in the

same position as the assignor and has no better rights than the assignor."

Based upon these instructions, if the jury determined that the "original owner" of Cherry Creek Nursing had consented to or agreed to competition, it necessarily would have found that East Hampden assumed the management agreement subject to such consent. Therefore, under these circumstances, the trial court did not err by not submitting Life Care's tendered instruction to the jury.

II.

Life Care also contends that the trial court erred in allowing East Hampden and Cheyenne to assert as an affirmative defense to its breach of contract claim Life Care's solicitation of the limited partners of each partnership. Under the circumstances presented here, we disagree.

At the outset, we will consider the propriety of the solicitation defense as to Cheyenne Nursing only. Unlike Cheyenne Place and Cherry Creek Nursing, for which the jury found against Life Care on other affirmative defenses, the solicitation defense was the sole affirmative defense asserted by Cheyenne Nursing to Life Care's breach of contract claim.

Life Care began soliciting the limited partners of Cheyenne in the summer of 1991 to obtain their consent to replace LPIMC with itself as the managing general partner. On July 15, 1991, LPIMC informed Life Care that it was terminating the management agreement effective July 22, 1991, as a result of Life Care's breach of its contractual and fiduciary obligations owed to Cheyenne by its solicitation of the limited partners and its failure to cure within a reasonable time.

In determining what fiduciary duties Life Care owed Cheyenne with respect to its solicitation of the limited partners, the trial court relied on *Treadway Cos. v. Care Corp.*, 638 F.2d 357 (2d Cir. 1980). In *Treadway*, two directors of Treadway, which was targeted for takeover by Care Corporation, were also officers in Care Corporation. The court held that the directors did not

breach their duties of loyalty to Treadway by seeking a change in the incumbent management because there was no actual conflict between the interests of the two companies and the takeover was not adverse to the best interests of Treadway.

The trial court, relying on *Treadway*, substantially adopted Life Care's argument on summary judgment concerning the solicitation issue, ruling:

> Just as the agent of a corporation generally owes a duty to the corporation (including management) and its shareholders, the agent of a limited partnership owes a duty to the limited partnership (including its managing general partner) and its limited partners.
>
> However, the Court finds that in the event that the interests of the partnership's incumbent management and its limited partners conflict, an agent, in an attempt to serve the best interests of the partnership and its limited partners, may take action which may not be in the best interest of present management.

Upon an expedited motion for reconsideration of its decision granting summary judgment in favor of Life Care on the solicitation issue, the trial court reversed its ruling finding that material questions of fact were present regarding: (1) whether a conflict existed between the LPIMC and the limited partners of Cheyenne; and (2) whether Life Care was seeking to serve the best interests of Cheyenne.

Life Care subsequently argued that the sole issue that should be submitted to the jury was whether its solicitation of the limited partners was in the best interests of the partnership. Life Care objected to the additional requirement that there be a conflict of interest between the general partner and the limited partners at the time the solicitation was made.

Life Care, however, tendered an instruction that was ultimately given to the jury. This instruction followed the trial court's ruling on summary judgment and provided:

> In the event that the interests of a partnership's incumbent management and its limited partners conflict, an agent, in an attempt to serve the best interests of the partnership and its limited partners, may take action which may not be in the best interests of incumbent management. In a limited partnership, it is the general partner(s) which manages the partnership.

Subsequently, during the hearing on instructions, Life Care reiterated its prior objections, in essence objecting to its own tendered instruction. Thus, even if we agree with Life Care's position on appeal that the trial court impermissibly added an additional requirement, we conclude that Life Care by its summary judgment position and by tendering the instruction set forth above was precluded from any objection it may have had to the added element that there be a conflict of interest between the general and limited partners. *See Caldwell v. Kats,* 193 Colo. 384, 567 P.2d 371 (1977) (even if verdicts were inconsistent, they were permitted under instructions submitted by parties, so judgment will not be reversed).

Therefore, the trial court did not err in permitting Cheyenne Place to raise Life Care's solicitation as an affirmative defense and in instructing the jury as set forth above.

III.

Life Care asserts that the awards for compensatory damages are not supported by sufficient evidence of causation, are duplicative, and are improper because the awards include damages for the period after East Hampden terminated the management agreement with Life Care and after Life Care could have unilaterally terminated the contract. We agree in part.

A.

Life Care first contends that East Hampden failed to show adequate causation of damages. We disagree.

To recover damages for future lost profits, the party seeking such damages must establish with reasonable, but not necessarily mathematical, certainty both the fact of the injury and the amount

of the loss. Sufficient evidence must be presented to compute a fair approximation of the loss. *Pomeranz v. McDonald's Corp.*, 843 P.2d 1378 (Colo. 1993). Lost profits may not be awarded if they are speculative, remote, imaginary, or impossible to ascertain. *Western Cities Broadcasting, Inc. v. Schueller,* 849 P.2d 44 (Colo. 1993). The damages awarded must be "traceable to and [must be] the direct result of the wrong to be redressed." *Graphic Directions, Inc. v. Bush,* 862 P.2d 1020, 1025 (Colo.App. 1993).

East Hampden presented testimony on damages, in part, through an expert witness in the field of economic analysis and the financial aspects of the nursing home industry. In determining the damages East Hampden incurred because of competition from CCRV and Garden Terrace, East Hampden's expert testified that he calculated the amount of net income that each patient generated based on the historical records of Cherry Creek Nursing regarding revenues and costs. He then estimated the number of patients that Cherry Creek Nursing would lose as the result of continued competition from CCRV and Garden Terrace and calculated the total damages by multiplying that number with the net income per patient.

Life Care contends that these calculations were deficient because the assumptions relied upon by East Hampden's expert failed to establish causation. In addition, Life Care asserts that East Hampden's expert failed to account for the undisputed benefit of having CCRV next door, failed to account for property-related expenses, and erroneously assumed that East Hampden was entitled to recover all damages resulting from any decline in the number of Alzheimer and assisted-living patients at Cherry Creek Nursing solely from Life Care. We are not persuaded that these alleged errors require reversal.

Because the damages calculations were based on historical revenues and costs, and because the underlying assumptions concerning patient loss, growth rates, and the effects of adverse competition from CCRV and Garden Terrace have support in the record, we conclude that the calculations are reasonable and could

be determined by the jury to be a valid means for determining damages.

B.

Life Care next contends that the jury's award of damages on East Hampden's Medicaid certification counterclaim are duplicative. We agree.

East Hampden's own expert on damages testified that the damage calculations for the breach of fiduciary duties and Medicaid certification counterclaims were mutually exclusive. He stated that, if Life Care had not competed for patients, there would not have been a need for Life Care to recommend Medicaid certification and, hence, no damages on the Medicaid claim would have been appropriate.

We reject East Hampden's argument that Life Care waived any objection because it did not request an instruction that, if the jury awarded damages on the breach of fiduciary duty counterclaim, it was not to award damages on the Medicaid counterclaim. Because the award is without support in the record, we conclude that Life Care did not waive its right to object to these damages.

We also reject East Hampden's argument that if the jury awarded the low range estimate of damages, the damages awarded were not duplicative of the Medicaid damages. That argument is also without support in the record.

East Hampden's expert did not testify that, in the event the jury awarded the low range estimate of damages, it would have been appropriate for it also to award damages for Life Care's alleged failure to recommend Medicaid certification. East Hampden's expert stated that the medium range estimates represented East Hampden's actual damages. The low and high range estimates were merely posited to show the jury the effect of varying the number of projected patients at Cherry Creek Nursing for future years.

Because there is no support in the record for the jury's award of damages on both claims, the award of damages for the Medicaid counterclaim must be reversed. Because we are unable to determine what portion, if any, of the jury's award of $2 million on East Hampden's counterclaims for breach of contract is for Medicare reimbursement, we must remand for a new trial on that issue.

C.

Life Care contends that the awards for compensatory damages are improper because they include damages for the period after East Hampden terminated the management agreement with Life Care. We disagree.

Life Care argues that, under *Restatement (Second) of Agency* § 396(a) (1958), it was free to compete with Cherry Creek Nursing after April 8, 1991, the date East Hampden terminated the management agreement, and thus, no damages should have been awarded for the period following termination. Alternatively, Life Care argues that East Hampden, at most, should be allowed to recover damages through March 9, 1993, at which point Life Care had the sole option to terminate the management agreement. We find no merit in either argument.

Restatement (Second) of Agency § 396(a) (1958) provides that:

> Unless otherwise agreed, after the termination of the agency, the agent:
>
> (a) has no duty not to compete with the principal. . . .

This rule finds support in *Restatement (Second) of Agency* § 393 comment e (1958) which provides that after the agency relationship has been terminated, "the agent can properly compete with his principal as to matters for which he has been employed."

Although these *Restatement* provisions set out the general rule, when, as here, it is the agent's breach of fiduciary duties that was the cause for the termination, the agent should not be able to benefit from the termination by being able to compete

immediately with the principal. *See* W. Sell, *Agency* § 138 at 124-125 (1975); 3 *C.J.S. Agency* § 287 at 73 (1973) (an agent is not "permitted to terminate an agency in bad faith in order to take advantage of his principal's condition or to profit by information resulting from his agency."). Hence, the award of damages for the period after April 8, 1991, was proper.

We also reject Life Care's contention that East Hampden's damages should be limited to the period through March 9, 1993, at which time the management agreement would have expired unless Life Care had exercised its sole option to renew for an additional five-year period. If we accepted Life Care's argument, a party could act with impunity at the end of a contract term knowing that its actions would be without consequence. The inequity of Life Care's argument is further illuminated by the fact it sought damages for East Hampden's breach of contract for the entire five-year renewal term. While we acknowledge that Life Care had the sole option to renew the agreement and East Hampden could only terminate the agreement for cause, Life Care cannot have it both ways.

Therefore, we agree with the trial court's conclusion that East Hampden was entitled to damages for the same period that Life Care itself sought damages.

D.

Life Care further contends that East Hampden was improperly allowed to seek recovery of the management fees that it would have earned because of its management of the competing facilities. Life Care did not raise this issue in the trial court, nor did it object to the jury being instructed that, in determining damages, it could consider not only any economic loss of East Hampden but "anything of value or any profit Life Care or American Lifestyles received as a result of Life Care's breach of fiduciary duty."

Having failed to protest, Life Care has waived any objection to the jury being so instructed and, because the jury's award of $6 million was less than what East Hampden sought for its

economic losses, it is permissible to infer that the jury did not award East Hampden any of Life Care's management fees.

V.

Life Care further asserts that the exemplary damages award should be reversed because it is not supported by sufficient evidence that Life Care's actions were malicious or willful and wanton beyond a reasonable doubt and are improper under Colorado law and the Due Process Clause of the United States Constitution. We reject both arguments.

A.

An award of exemplary damages is controlled by statute. The relevant statute provides that exemplary damages are proper only if the evidence shows that the actions that caused the injury are "attended by circumstances of fraud, malice, or willful and wanton conduct." Section 13-21- 102(1)(a), C.R.S. (1987 Repl. Vol. 6A). The amount of exemplary damages must be reasonable and cannot exceed an amount which is equal to compensatory damages, § 13-21-102(1)(a), and are to be awarded only if they are proved beyond a reasonable doubt. Section 13-25-127(2), C.R.S. (1987 Repl. Vol. 6A).

In reviewing an award of exemplary damages, we must determine "whether there was sufficient evidence, when viewed in its totality and in the light most supportive of the verdict, to support the jury's finding. . . ." *Frick v. Abell,* 198 Colo. 508, 511, 602 P.2d 852, 854 (1979).

Here, when viewed in a light most supportive of the verdict, there was ample evidence to support the jury's award of exemplary damages. In particular, there was evidence that Life Care was actively seeking to recruit patients at Cherry Creek Nursing for the assisted-living program at CCRV. The marketing director of CCRV prepared a memorandum in which she stated: "I found at least 35 very good prospects for our retirement community on the second floor of [Cherry Creek Nursing]."

Furthermore, after CCRV opened, Life Care proposed that East Hampden convert the assisted-living unit to a skilled nursing unit. Life Care made this proposal even though its regional vice president testified that he was opposed to the idea. In addition, Preston, in a letter to the general partner of Cherry Creek Nursing shortly after CCRV opened, reiterated this plan, stating that:

> The time has now come to do the conversion and to place many of the people who would rather be in the retirement center setting next door at the new Cherry Creek Retirement Village. As you are aware, I have a personal interest in the retirement center; however, I feel like it is quite unfair to the partnership owning Cherry Creek Nursing Center to not divulge that many of the residents in the assisted living unit wish to be moved or have already moved because families feel that the retirement center environment is more of their choosing.

He also stated, in a blind copy of this letter to the president of Life Care, that:

> The financial impact on the nursing center could be considerable unless this is properly handled with the renovation and modification of the assisted living units.

The evidence also showed that the opening of Garden Terrace adversely impacted the number of Alzheimer patients at Cherry Creek Nursing. Several witnesses testified that Garden Terrace competed with Cherry Creek Nursing for patients. Garden Terrace hired the marketing director for Cherry Creek Nursing as its marketing director. In addition, there was evidence that approximately 50% of Cherry Creek Nursing's Alzheimer patients moved to Garden Terrace. As a result of the decline in patients, Cherry Creek Nursing closed one of its Alzheimer units. We conclude that this evidence is sufficient to support an award of exemplary damages under the statutory standard. *See Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984).

B.

We also reject Life Care's contention that the award of exemplary damages violates the Due Process Clause of the United States Constitution. Life Care argues that the exemplary damages, which it states are in excess of 10% of its net worth, constitute a disproportionately large percentage of its net worth. We conclude that the award here, which was limited to an amount equal to the compensatory damages awarded on East Hampden's breach of fiduciary duties claim, does not violate the Due Process Clause of the United States Constitution. *See Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); *Palmer v. A.H. Robins Co., supra.*

VI.

Lastly, Life Care asserts that the trial court misconstrued s 5-12-102, C.R.S. (1992 Repl.Vol. 2), and erred in awarding East Hampden $2.1 million in prejudgment interest on the damages awards. We agree.

In *Shannon v. Colorado School of Mines*, 847 P.2d 210, 213 (Colo.App. 1992) a division of this court stated: "Section 5-12-101 specifically awards interest on money which is due and owing prior to the date of payment or prior to the date of judgment." (emphasis added) The court then concluded that: "Thus, under § 5-12-101, interest may not be awarded on lost future wages and benefits because they are not due and owing prior to the entry of judgment." *Shannon v. Colorado School of Mines, supra* at 213 (emphasis in original). That holding is dispositive of the issue here.

Here, the trial court awarded prejudgment interest on past and future damages. Therefore, we conclude the trial court's award of prejudgment interest must be reversed and an award of prejudgment interest entered on only those damages incurred prior to the entry of judgment.

That part of the judgment awarding $2 million on East Hampden's counterclaims for breach of contract is reversed, and

the cause is remanded for new trial on that claim. That part of the judgment awarding prejudgment interest is reversed, and the cause is remanded for an award of interest consistent with this opinion. The remainder of the judgment is affirmed.

STERNBERG, C.J., and HUME, J., concur.

SUPREME COURT, STATE OF COLORADO

CASE NO. 95SC315

CERTIORARI TO THE COLORADO COURT OF APPEALS,

93CA0222 & 93CA0581

DISTRICT COURT, CITY AND COUNTY OF DENVER,

91CV2410

ORDER OF COURT

LIFE CARE CENTERS OF AMERICA, INC., a Tennessee corporation, and AMERICAN LIFESTYLES, INC., a Tennessee corporation,

Petitioners,

v.

EAST HAMPDEN ASSOCIATES LIMITED PARTNERSHIP; CHEYENNE ASSOCIATES LIMITED PARTNERSHIP; JOHN W. GALSTON; EUGENE H. ROSEN; BRUCE WEINSTEIN; LPIMC, INC.; and INTEGON LIFE INSURANCE CORPORATION,

Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals.

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, OCTOBER 2, 1995.

JUSTICE MULLARKEY would grant as to the following issues:

Whether the court of appeals erred in rejecting Life Care's argument that its management of other long-term care facilities was not, as a matter of law, a breach of its fiduciary duties to East Hampden.

Whether the court of appeals erred in allowing the jury to award compensatory damages for the period after East Hampden terminated the management agreement with Life Care.

Whether the court of appeals affirmance of the jury's exemplary damages award of $6 million violated Colorado law and due process protections.

[seal, Supreme Court,
State of Colorado]

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

District Court No. 91 CV 2410 Courtroom 20

ORDER

LIFE CARE CENTERS OF AMERICA, INC., a Tennessee corporation, and AMERICAN LIFESTYLES, INC., a Tennessee corporation,

vs.

EAST HAMPDEN ASSOCIATES LIMITED PARTNERSHIP; CHEYENNE ASSOCIATES LIMITED PARTNERSHIP; JOHN W. GALSTON; EUGENE H. ROSEN; BRUCE WEINSTEIN; LPIMC, INC.; and INTEGON LIFE INSURANCE CORPORATION,

Defendant(s).

Plaintiffs' Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial is denied.

DONE AND SIGNED this 5th day of February, 1993.

BY THE COURT:

/s/ Robert S. Hyatt
Robert S. Hyatt
District Court Judge

Supreme Court, U.S.
FILED
JAN 31 1996
CLERK

No. 95-1051

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

LIFE CARE CENTERS OF AMERICA, INC. AND
AMERICAN LIFESTYLES, INC.,

Petitioners,

v.

EAST HAMPDEN ASSOCIATES LIMITED PARTNERSHIP,
ET AL.,

Respondents.

On Petition For Writ Of Certiorari To
The Colorado Court Of Appeals

BRIEF FOR RESPONDENTS IN OPPOSITION

LEIGHTON AIKEN
(Counsel of Record)
DANA M. CAMPBELL
OWENS, CLARY & AIKEN, L.L.P.
1717 Main Street
Suite 2400
Dallas, TX 75201
(214) 698-2100

JOHN C. TREDENNICK
ELIZABETH A. PHELAN
HOLLAND & HART
555 - 17th Street
Suite 3200
Denver, CO 80201-8749
(303) 295-8000

Attorneys for Respondents

31 pp

QUESTION PRESENTED

Whether the award of punitive damages, in an amount equal to the actual damages and based upon evidence proven beyond a reasonable doubt, violated the Due Process Clause where the circumstances of this case demonstrate that the award was reasonable and the procedures used in assessing and reviewing the award imposed sufficiently definite and meaningful constraints on the discretion of the jury.

PARTIES TO THE PROCEEDINGS

The petition accurately identifies the parties to the proceedings in the Colorado Court of Appeals, except that Cheyenne Associates Limited Partnership also was a defendant-appellee.

Pursuant to Supreme Court Rule 29.6, respondent East Hampden Associates Limited Partnership states that it is a Delaware limited partnership and that none of its partnership interests is publicly traded.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 12

I. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S RECENT DECISIONS CONSIDERING PUNITIVE DAMAGE AWARDS 13

1. This Court's Decisions in *Haslip* and *TXO* Do Not Require an Analysis of the Closeness of the Case. 17

2. Due Process Does Not Require That a Punitive Damage Award Be Judged by a Defendant's Net Worth 19

II. THE APPELLATE REVIEW AFFORDED LIFE CARE WAS CONSTITUTIONALLY ADEQUATE. 20

III. THE ISSUES IN *BMW* ARE NOT PRESENT HERE. 22

CONCLUSION 23

APPENDIX

TABLE OF AUTHORITIES

CASES

Benny M. Estes & Assoc. v. Time Ins. Co., 980 F.2d 1228 (8th Cir. 1992) 17

BMW of North America, Inc. v. Gore, 646 S.2d 619 (Ala. 1994), *cert. granted*, 115 S.Ct. 932 (1995) 22

CEH, Inc. v. F/V Seafarer, 70 F.3d 694 (1st Cir. 1995) 16, 19

Continental Trend Resources, Inc. v. Oxy U.S.A., Inc., 44 F.3d 1465 (10th Cir. 1995) 16

Dunn v. Hovic, 1 F.3d 1371 (3d Cir.), *cert. denied*, 114 S.Ct. 1650 (1993) 11, 21, 22

Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377 (5th Cir. 1991) 15, 16

Frick v. Abell, 198 Colo. 508, 602 P.2d 852 (1979) 21

Honda Motor Co. Ltd. v. Oberg, 114 S.Ct. 2331 (1994) 13

Hopkins v. Dow-Corning Corp., 33 F.3d 1116 (9th Cir.), *cert. denied*, 115 S.Ct. 734 (1994) 16

Johnson v. Hugo's Skateway, 974 F.2d 1408 (4th Cir. 1992) 22

Latham Seed v. Nickerson Am. Plant Breeders, Inc., 978 F.2d 1493 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 3037 (1993) 19

Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991) 21, 22

Mince v. Butters, 200 Colo. 501, 616 P.2d 127 (1980) 21

Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032 (1991) ..... passim

Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984) 21

Price v. Highland Community Bank, 932 F.2d 601 (7th Cir. 1991) 17

Robertson Oil Co. v. Phillips Petroleum Co., 14 F.3d 373 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 2120 (1994) 16, 22

TXO Prod. Corp. v. Alliance Resources Corp., 113 S.Ct. 2711 (1993) ..... passim

Vasbinder v. Scott, 976 F.2d 118 (2d Cir. 1992) 17

Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 29 S.Ct. 220 (1909) 21

Winant v. Bostic, 5 F.3d 767 (4th Cir. 1993) 17

STATUTES

Colo. Rev. Stat. § 13-21-102(1)(a) (1987 Repl. Vol. 6A) 14

Colo. Rev. Stat. § 13-25-127(2) (1987) Repl. Vol. 6A) 14

No. 95-1051

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

LIFE CARE CENTERS OF AMERICA, INC. AND AMERICAN LIFESTYLES, INC.,

Petitioners,

v.

EAST HAMPDEN ASSOCIATES LIMITED PARTNERSHIP, *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The Colorado Court Of Appeals

BRIEF FOR RESPONDENTS IN OPPOSITION

East Hampden Associates Limited Partnership ("East Hampden") respectfully responds to the petition for writ of certiorari filed by Life Care Centers of America, Inc. ("Life Care") to review the judgment of the Colorado Court of Appeals in this case.

INTRODUCTION

The petition should be denied for three fundamental reasons. First, it is based on an erroneous assumption—that the Colorado Court of Appeals "did not conduct anything resembling a 'thorough,' 'careful' appellate review." Pet. at 20. To the contrary, the Colorado Court of Appeals carefully reviewed and

assessed the evidence supporting the punitive damage award. Pet. App. 13a-15a,[1] thereby complying in all respects with the constitutional safeguards required by *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032 (1991), and *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711 (1993).

Second, meaningful constraints were imposed upon the jury in this case. Specifically, without objection from Life Care, the jury was instructed that any award of punitive damages (a) had to be supported by the "beyond a reasonable doubt" evidentiary standard, (b) could not exceed the amount of compensatory damages, and (c) could be assessed only to punish Life Care, not to reward East Hampden. These specific, meaningful constraints fully comport with this Court's prior decisions.

Third, Life Care has waived its contention that the Colorado courts did not analyze the objective factors of "closeness of the case" or the impact of the award on its net worth. Life Care did not seek to introduce evidence at trial (a) that it lacked "notice" that its conduct was unlawful or (b) of its net worth. Further, Life Care never requested the trial court to instruct the jury concerning these two "objective factors" in connection with East Hampden's claim for punitive damages.

STATEMENT OF THE CASE

Background. In 1987, East Hampden purchased the Cherry Creek Nursing Center ("CCNC"). At that time, CCNC was a nursing home offering skilled nursing care, assisted living, and specialized care for those suffering from the Alzheimer's disease. Pet. App. 1a.

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[1] The appendix attached to the petition is cited as "Pet. App." The appendix attached to this brief in opposition is cited as "Opp. App." The brief that respondents filed in the Colorado Court of Appeals is cited as "Appellees' Br. at _____."

Through April 1991, Life Care managed CCNC for East Hampden and was responsible for the day-to-day operations. In April 1991, East Hampden terminated Life Care after learning that Life Care had misappropriated key business opportunities and fiscally mismanaged CCNC. *Id.* at 2a. As a result of Life Care's wrongful conduct, CCNC was in financial ruin, with two of its three profit centers, assisted living and Alzheimer's care, all but destroyed.

Life Care's Duties Under the Management Agreement. As manager of CCNC, Life Care acted as agent for East Hampden and owed it strict fiduciary duties. Forrest Preston, Life Care's CEO and sole shareholder, testified that Life Care owed East Hampden the duties of "loyalty," "trust," "honesty," "the duty to look after East Hampden's best interests," and "the duty to maximize East Hampden's profits." He expressly admitted that Life Care would breach its duties to East Hampden if it engaged in activities that diverted patients from CCNC. Roger Park, Life Care's president of operations, confirmed Preston's understanding of Life Care's role as agent. He testified that Life Care had a duty to operate CCNC profitably, efficiently, and in the best interests of East Hampden. According to Park, Life Care had an obligation not to engage in any activity that would have a negative impact on CCNC. Appellees' Br. at 2.

Andrew Blair, an attorney hired by Life Care, provided expert testimony regarding Life Care's duties as agent and fiduciary to East Hampden. He stated that an agent's highest duty was full and complete disclosure. He explained that this obligation required an agent to disclose fully all facts that could adversely affect the operations of its principal's assets. According to Blair, if an agent engaged in competition against its principal, it was required first to make full disclosure and obtain a written waiver of any conflict of interest. *Id.*

Another Life Care witness, David Vaughan, general partner of CCNC's prior owner, testified regarding his understanding of Life Care's duties as manager of CCNC. Vaughan stated unequivocally that he neither intended nor envisioned that

Life Care would compete with, or divert patients from, CCNC.[2] He also testified that there was no understanding or agreement that Life Care could compete with, or manage facilities that competed with, CCNC. When questioned on the point, he testified:

> Q. And had you known that they were engaged in activities which either diverted patients from the [CCNC] or pulled patients out of the [CCNC], as general partner you would have fired them, wouldn't you have, sir?
>
> A. [A]nd the answer to your question . . . I would fire them. . . .
>
> Q. The general partner of any partnership that owned the [CCNC] would have that right, correct?
>
> A. I presume so.

Id at 3.

Life Care's Scheme to Divert Assisted Living Patients to the Cherry Creek Retirement Village. In 1986, Preston acquired the land next to CCNC to develop a retirement center, to be called the Cherry Creek Retirement Village ("CCRV"). As originally planned, CCRV would cater to retired individuals seeking independent living arrangements, not persons needing assisted living services. For that reason, Life Care represented that CCRV would operate as a feeder to CCNC, not compete for patients. Life Care represented that it would manage the two facilities and operate both as a "campus." As residents aged, they would move from the independent living apartments at CCRV to CCNC, which

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[2] Until 1989, when it opened CCRV and Garden Terrace, Life Care neither competed with CCNC nor managed or owned nursing facilities that competed with CCNC. *Id.*

offered higher levels of care in its assisted living and skilled nursing care units. *Id.* at 4.

By the spring of 1988, Preston and Life Care were having problems obtaining financing for the proposed retirement center. In part, this was due to the soft market for retirement facilities. At the time, lenders were expressing a general lack of confidence in retirement centers as a profitable business, and the Denver real estate market was in a recession. Potential lenders also balked at the size of the loan sought by Life Care. In fact, more than 20 different lenders had rejected Life Care's proposals during this two-year period. The viability of the proposed retirement center was so tenuous that its marketing director offered to resign. *Id.* at 4-5.

However, Preston and Life Care had invested more than $2.0 million to develop the retirement center. In an attempt to salvage this sizable investment, Karen Speir, CCRV's marketing director, and Bryan Preston, Preston's son, recommended to Larry Richardson, vice president of Life Care's retirement division, that Life Care consider alternative uses for the site. One alternative use, recommended by Richardson, was that Life Care add an assisted living unit. *Id.* at 5.

To keep their project alive, in 1988, Preston and Life Care decided to follow Richardson's recommendation and add an assisted living unit at CCRV. At this time, Life Care knew that assisted living was profitable to CCNC. For years, Life Care had marketed CCNC's assisted living unit as one of the "finest wellness programs" in the region. *Id.* Life Care also knew its decision to offer assisted living at CCRV would have a negative impact on CCNC. Preston admitted privately that the "financial impact on [CCNC] could be considerable" because CCRV's assisted living unit would attract residents from CCNC. Pet. App. 14a. As Preston and Life Care knew, many people seeking assisted living services find a retirement center, like CCRV, more attractive than a nursing home, like CCNC. *Id.* Moreover, Larry Richardson warned Ned Wilford, president of Life Care, that CCRV would attract patients from CCNC. Life Care not only failed to give a

similar warning to East Hampden, but Preston falsely represented that CCRV would have a positive impact on CCNC. Appellees' Br. at 6.

Life Care concluded, however, that an assisted living program like CCNC's would have "enormous appeal" and would be financially beneficial to CCRV. Among other things, it would afford Life Care the opportunity to charge higher rates, meet competition from other retirement centers, and keep residents at CCRV for a longer period of time. Higher revenues would also translate to greater profits for Forrest Preston. Almost immediately, Life Care began touting the potential success of an assisted living program, like the one at CCNC, to induce lenders to finance CCRV. *Id.*

Life Care Secretly Targets CCNC Patients. Before opening CCRV, Life Care did not disclose to East Hampden its plan to add an assisted living unit. Despite the obvious impact this new competition would have, Life Care did not reveal its intentions in its 1988 or 1989 management reports for CCNC. Even Raymond Tyler, Life Care's regional vice-president who oversaw CCNC's operations, was not told of Life Care's plans until just three months before the opening of CCRV. *Id.*

Once Life Care made the decision to add assisted living to CCRV, it secretly began targeting CCNC's assisted living patients. CCRV's executive director, Arletta Bourne, visited CCNC in an effort to identify possible candidates for a transfer to the CCRV. *Id.* Life Care's marketing director, Karen Speir, made a similar visit to CCNC and reported: "I found at least 35 very good prospects for our retirement community on the second floor of the [CCNC] nursing home." Pet. App. 13a.

CCRV opened in September 1989. Almost immediately thereafter, CCNC began losing patients, as Preston expected. Life Care went so far as coordinating the likely influx of patients from CCNC to CCRV. Appellees' Br. at 7.

Life Care's Scheme to Conceal Its Wrongful Competition and to Move Additional Patients to CCRV. Life Care was not satisfied merely to compete for assisted living patients against CCNC. Instead, it devised a scheme to persuade East Hampden to convert its profitable assisted living unit to skilled nursing beds. Pet. App. 14a. This would accomplish two objectives: it would eliminate Life Care's inherent conflict of interest and it would bring any remaining assisted living patients from CCNC to CCRV.

In October of 1989, a month after CCRV opened, Life Care wrote to East Hampden to propose a $400,000 conversion of CCNC's 60-unit assisted living unit into a luxury skilled care nursing unit. Preston claimed that it was always intended that the assisted living patients would be moved to CCRV upon its opening. He also represented that the move would be more profitable for the partnership. Appellees' Br. at 7. These representations were untrue.

First, numerous Life Care witnesses contradicted Preston and testified that it was never intended that assisted living patients would move from CCNC to CCRV. Larry Richardson, Life Care's senior vice president, testified that Preston's claim was "a preposterous notion." Other Life Care witnesses testified that the inclusion of assisted living at CCRV was a complete departure from the original plan for CCRV because the CCRV was always intended to be complementary to, rather than competitive with, CCNC. *Id.* at 7-8. Indeed, Life Care's witnesses confirmed that, before mid-1988, there were no plans to offer assisted living at CCRV and all marketing efforts at CCRV were aimed solely at independent living residents because CCRV was only to be "an independent living facility." *Id.* at 8.

Second, Preston's claim that adding 60 luxury skilled nursing beds would be profitable for CCNC was also untrue. By mid-1988, Preston knew that competition for skilled nursing patients in the CCNC's market was increasing dramatically, making CCNC's traditional, skilled-nursing services less profitable. Moreover, Preston acknowledged at trial that, at the

time of Life Care's proposal to convert, the market for skilled nursing beds was so saturated that Life Care had no plans to open any skilled nursing homes in Southeast Denver. Indeed, Park (Life Care's president of operations) admitted that the plan to convert the assisted living unit at CCNC to skilled nursing beds was, from an operational standpoint, "nonsensical." *Id.*

The true reason behind Life Care's proposed conversion of the assisted living unit at CCNC was, as Tyler admitted, to help Life Care "in recruiting patients from the [CCNC] to the [CCRV]." Similarly, as Preston conceded at trial, the plan to convert was proposed "to help fill rooms at the [CCRV] [for] which [Preston and Life Care had] personally guaranteed $16.0 million of debt." *Id.*

In May 1990, Life Care was desperate to receive East Hampden's consent to eliminate CCNC's profitable assisted living unit, thereby precluding any claim of conflict of interest against Life Care. To that end, David Gooch, Preston's son-in-law, instructed Raymond Tyler (the Life Care officer who oversaw CCNC's operations for Life Care) to draft a list of reasons, which could be forwarded to East Hampden, "justifying" the conversion. Tyler balked, advising Gooch that he thought the proposal was not in CCNC's best interests. Gooch told Tyler to document the "reasons" anyway. Tyler complied and Life Care presented the written recommendations to East Hampden in a May 1990 letter. *Id.* at 8-9.

Life Care never told East Hampden that Tyler, the author of the recommendations contained in the May 1990 letter, was opposed to the conversion plan. Life Care also concealed the fact that certain significant representations contained in the May 1990 letter were untrue, as Tyler admitted at trial. Finally, Life Care never advised East Hampden that the proposal to convert the assisted living unit of CCNC was not in the best interests of CCNC, but instead was solely to benefit CCRV.

CCRV competed actively against CCNC for assisted living patients. In part because of its targeting of CCNC's resi-

dents, Life Care quickly filled the 24 units initially devoted to assisted living at CCRV. Demand was so great that Life Care added an additional 10-bed unit to CCRV, which completely filled by early 1990. At this time, CCNC could not fill its assisted living beds. In the fall of 1991, CCNC was forced to close its assisted living program because it could not compete with CCRV's program. *Id.*

Life Care's Scheme to Compete with CCNC for Alzheimer's Patients. Shortly after Life Care opened CCRV and began competing for assisted living patients, it opened Garden Terrace and began competing for Alzheimer's patients. *Id.* In so doing, Life Care again breached its duties by misappropriating valuable information, competing against CCNC, and taking its patients, all without notice to or consent from East Hampden.

By 1988, Life Care's internal studies revealed that the incidence of the Alzheimer's disease was increasing dramatically and that large numbers of people suffering from the Alzheimer's disease would need institutional care. The study also suggested that Southeast Denver would need additional capacity to care for such patients. Because it managed CCNC, Life Care knew that CCNC's Alzheimer's unit was extremely profitable and that CCNC was receiving as many as seven calls a day requesting Alzheimer's care. *Id.* at 10.[3]

Life Care never shared its internal studies with East Hampden. Rather than recommend expansion of CCNC's Alzheimer's services, Life Care used the information for its own financial benefit to develop and open Garden Terrace, located just three miles from CCNC. *Id.*

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[3] By February 1989, CCNC had two Alzheimer's units. It added the second unit because demand for Alzheimer's care was high. The additional patients were also expected to yield $250,000 in profits. *Id.*

Garden Terrace opened in the fall of 1989 and hired CCNC's marketing director. Except for Preston, virtually every other witness acknowledged that Garden Terrace competed with CCNC for Alzheimer's patients. As competitors, both facilities sought to attract the same patients and offered similar services. Pet. App. 14a.

Almost immediately after Garden Terrace opened, CCNC's Alzheimer's population began to decline. By the summer of 1990, just months after Garden Terrace opened, CCNC was forced to close one of its two units. More than ten former residents of CCNC had moved to Garden Terrace, which represented approximately fifty percent of the Alzheimer's patients at CCNC. *Id.*

The Legal Proceedings. The trial lasted eleven days. Faced with a claim for millions of dollars in actual damages and a commensurate amount in punitive damages, Life Care chose not to introduce evidence at trial that it lacked notice that its conduct was unlawful. Life Care also did not introduce evidence of its net worth for the jury's consideration in connection with the claim for punitive damages. Life Care never requested that the jury be instructed regarding "closeness of the case" or the relationship between a punitive damage award and its net worth. Rather, Life Care expressly approved the trial court's jury instruction concerning punitive damages. The jury instruction read:

> If you find in favor of East Hampden and award it actual damages on its claim of breach of fiduciary duty, then you shall consider whether exemplary damages should be assessed against Life Care.... *If you find beyond a reasonable doubt* that the injury complained of was attended by circumstances of malice or willful and wanton conduct, then in addition to actual damages, you may also assess a reasonable sum *as exemplary damages not to exceed the amount awarded as actual damages.*

> *Exemplary damages*, if assessed, *are to be assessed as punishment of Life Care* . . . and as an example to others.

Opp. App. 1a (emphasis supplied). In fact, Life Care submitted and received a virtually identical punitive damage instruction for its tortious interference claim against respondents.

The jury found that Life Care had breached its fiduciary duties as an agent of East Hampden and awarded $6 million in compensatory damages to East Hampden. Pet. App. 1a. Consistent with Colorado law, the jury also awarded $6 million in punitive damages. *Id.*

The trial court denied Life Care's motion for a new trial or a judgment n.o.v. *Id.* at 19a.[4] In that post-trial motion, Life Care again failed to offer evidence of its net worth.[5]

On appeal, Life Care was granted every opportunity to present its case before the Colorado Court of Appeals. Life Care requested and received permission to file a brief in excess of the length allowed under the Colorado Appellate Rules and convinced the Colorado Court of Appeals to double the time customarily

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[4] The trial court's review of the judgment was plainly adequate. In *TXO*, this Court held that although doing so is "always helpful," a trial court need not explain the basis for its ruling concerning a punitive damage award. 113 S.Ct. at 2724. *See Dunn v. Hovic*, 1 F.3d 1371, 1381 (3d Cir.) (relying on *TXO*, the Third Circuit rejected defendant's challenge to the punitive damage award based upon the trial court's failure to review the jury award *de novo*) , *cert. denied*, 114 S.Ct. 1650 (1993).

[5] Life Care offered evidence of its net worth for the first and only time in connection with a motion for stay of execution without security pending the filing and consideration of post-trial motions.

allowed for oral argument. With respect to the punitive damage award, Life Care asserted that the award should be reversed because (a) it was not supported by sufficient evidence, and (b) the award violated both Colorado law and the Due Process Clause.

In rejecting Life Care's challenge, the Colorado Court of Appeals relied on evidence regarding (a) Life Care's improper recruitment of patients from CCNC, (b) Life Care's knowing deceit of East Hampden in proposing a business plan to which its regional vice president was opposed, (c) Life Care's concealment of the financial impact on East Hampden of its competitive activities, and (d) Life Care's hiring of CCNC's marketing director for Garden Terrace and knowing competition with, and attraction of patients from, CCNC to Garden Terrace. Pet. at 13a-15a. Based on this extensive assessment of the evidence, the Colorado Court of Appeals held that "there was ample evidence to support the jury's award of exemplary damages." *Id.* at 13a.

The Colorado Court of Appeals denied Life Care's petition for rehearing. Similarly, the Colorado Supreme Court denied Life Care's request for *certiorari* review. *Id.* 17a.

REASONS FOR DENYING THE PETITION

Both the trial and the appellate court, on three separate occasions, have rejected Life Care's contention that the punitive damage award is unconstitutional. Specifically, the Colorado Court of Appeals reviewed the evidence in the record, which showed that with full knowledge of the devastating consequences to CCNC, Life Care systematically destroyed two of CCNC's most important profit centers for the sole purpose of benefiting Life Care and its affiliates. Pet. App. 13a-15a. The record also reflected that, in order to conceal its actions and attempt to obtain consent to its wrongful competition, Life Care engaged in a massive cover-up, based upon lies and deceptions, when CCNC began to experience the harms from Life Care's actions. *Id.* After considering this evidence, the Colorado Court of Appeals "conclude[d] that this evidence is sufficient to support an award of

exemplary damages. . . ." *Id.* This ruling was specific and fact-intensive and, therefore, met all the requirements of *Haslip* and *TXO.*

Moreover, the punitive damages award was based upon proper jury instructions that went beyond constitutional safeguards imposed by this Court. The jury was instructed that (a) Life Care's willful and wanton conduct had to be proved beyond a reasonable doubt, (b) the award could not exceed the amount of compensatory damages, and (c) the award was to punish Life Care, not reward East Hampden.

Finally, Life Care's principal ground for requesting review—that the Colorado Court of Appeals "failed to consider the objective factors of closeness of the case and petitioner's net worth," Pet. at 9—has been waived. Life Care never presented evidence at trial or requested that the jury be instructed regarding these "objective factors."

I. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S RECENT DECISIONS CONSIDERING PUNITIVE DAMAGE AWARDS

The review afforded Life Care by the Colorado Court of Appeals is consistent with this Court's decisions in *Haslip* and *TXO.*[6] Contrary to Life Care's suggestion, this Court has never required an analysis of "the closeness of the case" or the impact of

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[6] This Court's decision in *Honda Motor Co. Ltd. v. Oberg*, 114 S.Ct. 2331 (1994), is not relevant to this case. In *Honda*, this Court determined that Oregon law, which provided no procedure for reducing or setting aside an exemplary damage award except in narrow circumstances, violated due process. Life Care has not argued and cannot argue that Colorado law prohibits its appellate courts from reviewing exemplary damage awards. In fact, Life Care requested and received such review in this case. Pet. App. 13a-15a.

the award on the defendant's net worth. Rather, this Court has repeatedly upheld awards of punitive damages if the circumstances of the case indicate that the award is reasonable and the procedure used in assessing and reviewing the award imposes a sufficiently definite and meaningful constraint on the discretion of the jury.

In *Haslip*, this Court declined to adopt an objective test for upholding a punitive damage award under the due process clause, notwithstanding the unlimited discretion that the *Haslip* jury had in awarding punitive damages.[7] Specifically, this Court ruled:

> We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.

111 S.Ct. at 1043. The Court upheld a punitive damage award that was four times greater than the compensatory damage award.

In *TXO*, this Court again rejected the petitioner's request for an application of "certain 'objective criteria' to determine

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[7] Unlike the jury in *Haslip*, the jury in this case was restrained in two principal respects. First, the jury's exemplary damage award was limited, by statute, to the amount of the compensatory damage award. Colo. Rev. Stat. § 13-21-102(1)(a) (1987 Repl. Vol. 6A). Second, the evidentiary burden on East Hampden for establishing entitlement to punitive damages was a "beyond a reasonable doubt" standard, *id.* § 13-25-127(2), rather than the lenient standard of "preponderance of the evidence" approved in *Haslip*.

whether the punitive damage award violates . . . due process of law." 113 S.Ct. at 2719. In rejecting reliance on the "objective criteria" approach urged by TXO, this Court stated that "we question, however, the utility of such a comparative approach as a test for assessing whether a particular punitive damage award is presumptively unconstitutional." 113 S.Ct. at 2720. Instead, noting the safeguards in the judicial process, this Court held that a judgment that is a product of a fair judicial process is entitled to a strong presumption of validity. *Id.* at 2719-20.[8] The Court upheld a punitive damage award that was 526 times greater than the actual damage award.

Following *Haslip* and *TXO*, lower courts have similarly affirmed punitive damage awards if the circumstances of the case confirm the reasonableness of the award. In *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1382 (5th Cir. 1991), the Fifth Circuit held that the constitutional requirement that an award of punitive damages be reasonable under the circumstances of the case

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[8] Specifically, the Court explained:

> The members of the jury were determined to be impartial before they were allowed to sit, their assessment of damages was the product of collective deliberation based on evidence and the arguments of adversaries, their award was reviewed and upheld by the trial judge who also heard the testimony, and it was affirmed by unanimous decision of the State Supreme Court of Appeals. Assuming that fair procedures were followed, a judgment that is the product of that process is entitled to a strong presumption of validity.

TXO, 113 S.Ct. at 2719-20.

> [i]s not a vehicle for extensive appellate review. . . . It creates, instead, a narrow channel for appellate review in which the focus of a reviewing court is to ensure that, *under the circumstances of the case in question*, the award of punitive damages is not grossly excessive or unreasonable.

Id. (footnote omitted) (emphasis in original). The Fifth Circuit further noted that the fact-finder is in the best position to determine the amount of the punitive damage award, ruling:

> In reviewing the constitutionality of an award of punitive damages, a court may not explicitly or implicitly recalculate the award of damages; moreover, it may not express an opinion whether the award is too high or too low. Rather, the court may only consider whether the circumstances of the case offer some support for the amount of the award. If there are *any* circumstances of probative force that support the amount of the award, then the award meets the 'reasonableness' prong of the due process test in *Haslip*.

Id. (emphasis in original).[9]

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[9] Other circuit courts have drawn a similar conclusion. *See, e.g., Continental Trend Resources, Inc. v. Oxy U.S.A., Inc.*, 44 F.3d 1465 (10th Cir. 1995) (Tenth Circuit affirmed an award of $269,000 in compensatory damages, and $30 million in punitive damages); *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995) (First Circuit upheld a punitive damage award that was 55% of the defendant's net worth, noting that the award was reasonable in light of the circumstances of the case); *Hopkins v. Dow-Corning Corp.*, 33 F.3d 1116 (9th Cir.), *cert. denied*, 115 S.Ct. 734 (1994) (this Court declined review of a Ninth Circuit opinion upholding an award of $840,000 in compensatory damages and $6.5 million in punitive damages); *Robertson Oil Co. v. Phillips Petroleum*

(...continued)

The decision of the Colorado Court of Appeals is fully consistent with these decisions. The jury was presented with overwhelming evidence of Life Care's willful and wanton conduct, including its attempt to conceal its wrongdoing from East Hampden through nefarious means. *See supra* at 7-9. The trial court properly instructed the jury, without objection from Life Care, concerning the law relating to punitive damages, and the jury rendered its verdict applying the law to the facts in the case. The punitive damage award was reviewed and upheld by the judge who conducted the trial and heard all of the evidence, was affirmed by a unanimous decision of the Court of Appeals, and found not to warrant review by the Colorado Supreme Court. To require a more thorough review would be tantamount to requiring a trial *de novo* at the appellate level.

1. This Court's Decisions in *Haslip* and *TXO* Do Not Require an Analysis of the Closeness of the Case.

Life Care insists that an assessment of the evidence was required to determine the "closeness of the case"—or, in other words, whether Life Care had notice that its conduct was unlawful, even though it never raised this issue at trial. First, both

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(...continued)

Co., 14 F.3d 373 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 2120 (1994) (this Court declined review of an Eighth Circuit opinion affirming a punitive damage award that was more than four times greater than the compensatory damage award); *Benny M. Estes & Assoc. v. Time Ins.. Co.*, 980 F.2d 1228 (8th Cir. 1992); *Winant v. Bostic*, 5 F.3d 767 (4th Cir. 1993); *Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir. 1992) (Second Circuit, in reversing a punitive damage award that exceeded 50% of a defendant's net worth, held that "[a]n award of punitive damages should be reversed only if it is 'so high as to shock the judicial conscience and constitutes a denial of justice.'"); *Price v. Highland Community Bank*, 932 F.2d 601 (7th Cir. 1991).

Haslip and *TXO* squarely declined to adopt such an "objective" criterion. *See supra* at 13-15.

Second, the Colorado Court of Appeals did assess the evidence and concluded that Life Care's conduct was knowingly unlawful. The Colorado Court of Appeals specifically found that there was sufficient evidence establishing, among other things, that Life Care actively recruited patients from CCNC to its facility, knew that its diversion of patients would have a negative financial impact on CCNC, knew that its own regional vice-president opposed the scheme to cover up its diversion of patients through the proposed conversion of CCNC's profitable assisted living unit, and deliberately attracted Alzheimer's patients from CCNC to its own facility. Pet. App. 13a-14a.

Moreover, Life Care's assertion that "there is not even a hint that the conduct in question was 'tortious,'" Pet. at 13, completely ignores the evidence. *See supra* at 2-10. Life Care's chairman and president each admitted that any conduct of Life Care that diverted patients from CCNC was a breach of Life Care's duties to East Hampden. *Id.* at 3.

Furthermore, no jurisdiction has or would condone Life Care's conduct in this case. Life Care cannot cite a single decision that legalizes:

- its scheme to divert patients from CCNC to its own facility;
- its attempt to steal patients from CCNC;
- its plan to conceal its wrongful competition through a business plan that its own regional vice president opposed and advised would harm CCNC; or

- its unlawful competition for Alzheimer's patients by concealing important marketing information and hiring CCNC's marketing director.

An agent that goes to such great lengths to harm its principal's business and then conceal its wrongful conduct has engaged in tortious conduct under the laws of any jurisdiction in this country.

2. Due Process Does Not Require That a Punitive Damage Award Be Judged by a Defendant's Net Worth.

Life Care claims that the failure to compare the relationship between the punitive damage award and its net worth violates due process, [10] yet has not cited a single case holding that the due process clause requires such an inquiry. To the contrary, in *Haslip*, this Court upheld a punitive damage award, even though no evidence of the defendant's net worth was introduced in accordance with Alabama law. *Haslip*, 111 S.Ct. at 1044.

Other courts have ruled that "there is no general rule defining the maximum proportion of net worth that may be exacted." *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 706 (1st Cir. 1995) (upholding a punitive damage award which was approximately 55% of the defendant's net worth). *See Latham Seed v. Nickerson Am. Plant Breeders, Inc.*, 978 F.2d 1493, 1499 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 3037 (1993) (Eighth Circuit held that none of the states whose law was at issue required the plaintiff to prove a defendant's net worth before recovering punitive damages).

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[10] In fact, the Colorado Court of Appeals *did* consider Life Care's net worth and correctly concluded that the award "does not violate the Due Process Clause. . . ." Pet. App. 15a.

In any event, Life Care has waived its right to argue that its net worth warrants a finding that the punitive damage award violates due process. Life Care did not offer evidence of its net worth at trial for the jury to consider in conjunction with East Hampden's request for punitive damages. Life Care did not offer or cite any evidence of its net worth in its Brief in Support of Motion for Judgment N.O.V., filed Dec. 17, 1992.[11] Instead, Life Care presented evidence of its purported net worth only in conjunction with a post-trial motion seeking a stay of execution without need for a surety bond pending the filing and consideration of substantive post-trial motions.

II. THE APPELLATE REVIEW AFFORDED LIFE CARE WAS CONSTITUTIONALLY ADEQUATE.

Life Care claims that the Colorado Court of Appeals' "implicit" application of the passion-and-prejudice standard conflicts with the decisions of other courts. Pet. at 18. This claim should be rejected because (a) the courts below did not apply a passion-and-prejudice standard and (b) the review conducted by the Colorado Court of Appeals is not in conflict with that given by any other court.

First, Life Care erroneously assumes that the Colorado Court of Appeals applied a passion-and-prejudice standard in reviewing the punitive damage award. To the contrary, the Colorado Court of Appeals applied the standard espoused by the Colorado Supreme Court, which standard was approved in *Haslip*, 499 U.S. at 22.

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[11] Rather, in that brief, Life Care argued, without evidentiary support, that the *actual* damages award ($6 million) represented "one-fifth of Life Care's total net worth," that payment of that award would have "a substantial and unforgettable impact" on Life Care, and that an additional award of punitive damages was unnecessary. *Id.* at 92.

Under Colorado law, exemplary damages are justified where the defendant engages in "conduct that creates a substantial risk of harm to another and is purposely performed with an awareness of the risk and disregard of the circumstances." *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 215 (Colo. 1984). The trial court in the first instance, and later (if challenged) an appellate court, must decide whether the evidence suffices to warrant submitting the issue to the jury. *E.g., Mince v. Butters*, 200 Colo. 501, 616 P.2d 127, 129 (1980). As the Colorado Court of Appeals found, "[t]he standard to be applied [on appeal] is whether there was sufficient evidence, when viewed in its totality and in a light most supportive of the verdict, to support the jury's finding on this issue." *Frick v. Abell*, 198 Colo. 508, 602 P.2d 852, 854 (1979). *See* Pet. App. 13a. Applying this proper legal standard to the facts in the record, the Colorado Court of Appeals properly upheld the jury's award of punitive damages.[12]

Second, assuming that the Colorado Court of Appeals' decision fell under the rubric of a "passion-and-prejudice" review, Life Care's reliance upon the pre-*TXO* decision in *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), is misplaced. In *Mattison*, the Fourth Circuit inferred from the discussion in footnote 10 in *Haslip* that "the broad discretion given juries under the laws of Vermont and Mississippi is not adequately checked by court review . . . ," and held that such an inference was equally applicable to the South Carolina procedure. 947 F.2d at 98. However, no such broad discretion was given to the jury in this case. In an instruction approved by Life Care, the trial court admonished the jury that any award of punitive damages must be

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[12] Life Care's argument that review is warranted because of the "size of the exemplary damage award," Pet. at 8-9, is erroneous. As a matter of law, the size of a punitive damage award alone is not enough to constitute a violation of due process. *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 29 S.Ct. 220 (1909); *Dunn v. Hovic*, 1 F.3d 1371, 1383, *cert. denied*, 114 S.Ct. 1650 (1993).

supported by the beyond-a-reasonable-doubt evidentiary standard *and* must not exceed the amount of compensatory damages. *See supra* at 10-11. These constraints, coupled with the Colorado Court of Appeals' detailed review of the evidence supporting the award, establish that *Mattison* has no application here. Pet. App. at 13a-15a.[13]

III. THE ISSUES IN *BMW* ARE NOT PRESENT HERE.

Life Care argues that this case should be held pending a decision by this Court in *BMW of North America, Inc. v. Gore*, 646 S.2d 619 (Ala. 1994), *cert. granted*, 115 S.Ct. 932 (1995). Pet. at 22. The issues raised in *BMW* are not present here.

In *BMW*, the Alabama Supreme Court remitted the amount of the punitive damage award without offering any explanation for the remittitur. 646 S.2d at 629. Here, by contrast, the Colorado Court of Appeals did not merely affirm, without opinion or analysis, the punitive damage award. Rather, the Colorado Court of Appeals identified compelling evidence of Life Care's willful and wanton conduct, applied the legal requirements that the amount be reasonable and not exceed the actual damage award, and held that the punitive damage award did not violate due process. Pet. App. 13a-15a. Thus, *BMW* has no bearing on this case, and this case should not be stayed pending a decision in *BMW*.

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[13] Life Care's reliance on *Mattison* is misguided for another reason. At least two circuits have completely disregarded *Mattison* because it was decided before *TXO*. *See Robertson Oil*, 14 F.3d at 379 n.8; *Dunn*, 1 F.3d at 1381. Additionally, after *TXO*, several judges of the Fourth Circuit have criticized *Mattison*. *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1419-49 (4th Cir. 1992).

CONCLUSION

The petition should be denied.

Respectfully submitted,

LEIGHTON AIKEN
(Counsel of Record)
DANA M. CAMPBELL
OWENS, CLARY & AIKEN, L.L.P.
1717 Main Street
Suite 2400
Dallas, TX 75201
(214) 698-2100

JOHN C. TREDENNICK
ELIZABETH A. PHELAN
HOLLAND & HART
555 - 17th Street
Suite 3200
Denver, CO 80201-8749
(303) 295-8000

Attorneys for Respondents

APPENDIX

INSTRUCTION 65

If you find in favor of East Hampden and award it actual damages on its claim of breach of fiduciary duty, then you shall consider whether exemplary damages should be assessed against Life Care and American Lifestyles. If you find beyond a reasonable doubt that the injury complained of was attended by circumstances of malice or willful and wanton conduct, then in addition to actual damages, you may also assess a reasonable sum as exemplary damages not to exceed the amount awarded as actual damages.

Exemplary damages, if assessed, are to be assessed as punishment of Life Care and American Lifestyles and as an example to others.

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No. 95-1051

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

LIFE CARE CENTERS OF AMERICA, INC. AND
AMERICAN LIFESTYLES, INC.,
Petitioners,

v.

EAST HAMPDEN ASSOCIATES LIMITED PARTNERSHIP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION, ACROMED CORPORATION, THE ALLEN GROUP, AMERICAN GREETINGS CORPORATION, ELSAG BAILEY, INC., M.A.HANNA COMPANY, NACCO INDUSTRIES, INC., PARKER HANNIFIN CORPORATION, AND THE SHERWIN-WILLIAMS COMPANY AS AMICI CURIAE IN SUPPORT OF THE PETITION

SHERMAN JOYCE
VICTOR E. SCHWARTZ*
AMERICAN TORT REFORM
ASSOCIATION
1212 New York Avenue, N.W.
Washington, D.C. 20005
(202) 682-1168

*Counsel of Record

[Additional Counsel Listed On Inside Cover]

Of Counsel:

CAROLINE LUTZ
ACROMED CORPORATION

McDARA P. FOLAN
THE ALLEN GROUP

JON GROETZINGER, JR.
AMERICAN GREETINGS CORPORATION

MARK V. SANTO
ELSAG BAILEY, INC.

JOHN S. PYKE
M.A. HANNA COMPANY

CHARLES A. BITTENBENDER
NACCO INDUSTRIES, INC.

THOMAS A. PIRAINO
PARKER HANNIFIN CORPORATION

DALE A. NORMINGTON
THE SHERWIN-WILLIAMS COMPANY

MOTION FOR LEAVE TO FILE BRIEF FOR THE AMERICAN TORT REFORM ASSOCIATION, ACROMED CORPORATION, THE ALLEN GROUP, AMERICAN GREETINGS CORPORATION, ELSAG BAILEY, INC., M.A. HANNA COMPANY, NACCO INDUSTRIES, INC., PARKER HANNIFIN CORPORATION, AND THE SHERWIN-WILLIAMS COMPANY AS AMICI CURIAE IN SUPPORT OF THE PETITION

The American Tort Reform Association, Acromed Corporation, The Allen Group, American Greetings Corporation, Elsag Bailey, Inc., M.A. Hanna Company, NACCO Industries, Inc., Parker Hannifin Corporation, and The Sherwin-Williams Company (collectively, "*amici*") hereby move, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amici curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondent has declined to consent.

The American Tort Reform Association is a broad-based, bipartisan coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms who have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance and predictability in civil litigation.

The eight corporate *amici* are American corporations — some large, others small; most, but not all, publicly traded — who, as actual or potential defendants of punitive damages claims, have a common interest in ensuring that courts provide effective and meaningful review of punitive damage awards.

Defining the procedural and substantive limitations that the Due Process Clause of the Fourteenth Amendment imposes on punitive damages awards is an issue of vital importance to *amici*. *Amici* continue to be alarmed by the number of cases in which enormous, crippling punitive damage awards are levied by juries, yet are upheld with little or no rational analysis offered by the courts.

Consequently, *amici* are interested in the central question presented by this case — what sort of appellate review of punitive damage awards is required by the Due Process Clause. That question is an important one by any standard. In this case the Colorado courts upheld a $6 million award, based on a novel legal theory, against the petitioner, a small corporation. The state courts in this case offered no reason why such a harsh sanction was necessary or appropriate. *Amici* therefore have an interest in assuring that courts will effectively review and enforce the substantive limit on the size of punitive awards which is imposed by the Due Process Clause.

Amicus The American Tort Reform Association can, because of its nationwide constituency, provide this Court with a unique perspective on these issues and offer additional arguments underscoring the importance of this Court's review. The eight corporate *amici* are able to offer the perspective of individual businesses threatened with punitive damages. Additionally, *amicus* The American Tort Reform Association has, in other cases involving the constitutionality of punitive damage awards, demonstrated its interest in these issues by filing *amicus* briefs in this Court. *See, e,g., BMW of North America, Inc. v. Gore,* 115 S. Ct. 932 (1995) (granting writ of certiorari); *Honda Motor Co. v. Oberg,* 114 S. Ct. 2331 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.,* 113 S. Ct. 2711 (1993); *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1 (1991).

For these reasons, the Court should grant this motion for leave to file the attached brief *amici curiae* in support of the petition for certiorari.

Respectfully submitted,

SHERMAN JOYCE
VICTOR E. SCHWARTZ*
AMERICAN TORT REFORM ASSOCIATION
1212 New York Avenue, N.W.
Washington, D.C. 20005
(202) 682-1168

Of Counsel:

CAROLINE LUTZ
ACROMED CORPORATION

MCDARA P. FOLAN
THE ALLEN GROUP

JON GROETZINGER, JR.
AMERICAN GREETINGS CORPORATION

MARK V. SANTO
ELSAG BAILEY, INC.

JOHN S. PYKE
M.A. HANNA COMPANY

CHARLES A. BITTENBENDER
NACCO INDUSTRIES, INC.

THOMAS A. PIRAINO
PARKER HANNIFIN CORPORATION

DALE A. NORMINGTON
THE SHERWIN-WILLIAMS COMPANY

*Counsel of Record

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

I. THE ISSUE PRESENTED IS IMPORTANT AND RECURRING 1

II. CLOSE APPELLATE REVIEW OF PUNITIVE DAMAGES AWARDS IS CRITICAL AND REQUIRED BY DUE PROCESS. 5

1. The Private Interest Is Substantial. 6

2. The Absence Of Effective Review Carries A High Risk Of Erroneous Deprivation 7

3. Effective Appellate Review Is Minimally Burdensome To The Government And Not Burdensome At All To The Opposing Party 11

CONCLUSION 12

TABLE OF AUTHORITIES

Page

Cases

Ake v. Oklahoma, 470 U.S. 68 (1985) 11
Ampat/Midwest, Inc. v. Illinois Tool Works, Inc., 896 F.2d 1035 (7th Cir. 1990) 7
Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71 (1988) 6
BMW of North America, Inc. v. Gore, 646 So. 2d 619 (Ala. 1994), *cert. granted*, 115 S. Ct. 932 (1995) 5
Brown v. Mississippi, 297 U.S. 278 (1936) 10
Connecticut v. Doehr, 111 S. Ct. 2105 (1991) 11
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 7
Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992) 4
Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994) . . . . . *passim*
Johansen v. Combustion Engineering, Inc., 67 F.3d 314 (11th Cir. 1995), *petition for cert filed*, 64 U.S.L.W. 3486 (Jan 4, 1996) (No. 95-1072) 3, 4
Lawrence v. Chater, 64 U.S.L.W. 3460 (U.S. Jan 8, 1996) 11
Mathews v. Eldridge, 424 U.S. 319 (1976) 6
Medina v. California, 112 S. Ct. 2572 (1992) 6
Okocha v. Fehrenbacher, 655 N.E.2d 744 (Ohio Ct. App. 1995) 4
In re Oliver, 333 U.S. 257 (1948) 10
Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 4, 5, 7, 10
Parham v. J.R., 442 U.S. 584 (1979) 6
Pridemore v. Cherry, 903 S.W.2d 705 (Tenn. Ct. App. 1995) 4
Sessums v. Northtown Limousines, Inc., 664 So. 2d 164 (Miss. 1995) 3
Tanner v. Rite Aid of West Virginia, Inc., 461 S.E.2d 149 (W. Va. 1995) 3
Tumey v. Ohio, 273 U.S. 510 (1927) 10

TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993) 2, 5, 7
United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993) 6
Washington v. Whitaker, 451 S.E.2d 894 (S.C. 1994) 2, 3
In re Winship, 397 U.S. 358 (1970) 11

Statutes and Rules

Colo. Rev. Stat. 13-21-102(1)(a) 9
11th Cir. R. 36-1 4

Miscellaneous

Clarence Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173 (1931) 10
David Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258 (1976) 10
James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117 (1984) 10
William H. Volz & Michael C. Fayz, *Punitive Damages and the Due Process Clause: The Search for Constitutional Standards*, 69 U. Det. Mercy L. Rev. 459 (1992) . . . 7
Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371 (1995) 8
James Boyd White, *Whats an Opinion For?*, 62 U. Chi. L. Rev. 1363 (1995) 8

INTEREST OF THE AMICI CURIAE

The American Tort Reform Association ("ATRA"), founded in 1985, is a broad-based, bipartisan coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms who have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance and predictability in civil litigation.

The eight corporate *amici* — Acromed Corporation, The Allen Group, American Greetings Corporation, Elsag Bailey, Inc., M.A. Hanna Company, NACCO Industries, Inc., Parker Hannifin Corporation, and The Sherwin-Williams Company — are American corporations. Some are large corporations, others consider themselves small corporations. Most are publicly traded, but one is privately held. However, these corporations, as actual or potential defendants of punitive damages claims, have a common interest in ensuring that courts provide effective and meaningful review of punitive damage awards.

The central issue presented in this case — what sort of appellate review of punitive damage awards is required by the Due Process Clause — is a matter of substantial concern to each of these *amici*. *Amici* continue to be alarmed by the number of cases in which enormous, crippling punitive damage awards are levied by juries, yet are upheld with little or no rational analysis offered by the courts. *Amici* are therefore vitally interested in assuring that courts will effectively police and enforce the "substantive limit on the size of punitive damage awards" which the Due Process Clause imposes. *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2335 (1994).

I. THE ISSUE PRESENTED IS IMPORTANT AND RECURRING

This case presents an important and often recurring issue which is potentially presented by every punitive damage case litigated in the United States. While it is established that states must provide appellate review of the amount of punitive damages awarded by a jury to satisfy Due Process, *Honda*, 114 S. Ct. at 2341, the Court has yet to establish what sort of appellate review satisfies Due Process. The central question presented by this case is

whether the Due Process Clause requires close, meaningful appellate review of punitive damage awards, in which the appellate court articulates reasons why such awards comport with Due Process principles.

The failure of appellate courts to effectively review the size of punitive damage awards is a pervasive and recurring problem. In *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), Justices O'Connor, White and Souter noted that in "case after case" involving enormous sums of punitive damages awarded by juries, "review has been inadequate or absent altogether." *Id.* at 2742 (O'Connor, J., joined by White and Souter, JJ., dissenting).

Indeed, until *Honda Motor Co., Ltd. v. Oberg*, 114 S. Ct. 2331 (1994), Oregon was altogether denying judicial review of the size of punitive damage awards. *See id.* at 2341. Oregon's appellate review procedures allowed the state's appellate courts to review punitive awards only for sufficient evidence, and foreclosed judicial review of the size of punitive damage awards. Despite the presence of trial-level and post-trial safeguards, this Court found the denial of appellate review unconstitutional: "Oregon's denial of judicial review of the size of punitive damage awards violates the Due Process Clause of the Fourteenth Amendment." *Id.*

In spite of the decision in *Honda*, the problem identified by Justice O'Connor in *TXO* — "inadequate or absent" appellate review — continues to this day. Appellate courts are repeatedly providing little if any meaningful appellate review to punitive damage awards. Several post-*Honda* examples bear this out.

In *Washington v. Whitaker*, 451 S.E.2d 894 (S.C. 1994), a civil-rights case, a jury awarded three plaintiffs actual damages of $1,000, $1,000, and $1,500, respectively. However, the jury awarded punitive damages of $75,000 to each plaintiff ($225,000 total) against the city, and $5,000 per plaintiff ($15,000 total) against an individual police officer. Defendants appealed. After noting that the trial judge had conducted a post-trial review and

determined that the award was appropriate, the South Carolina Supreme Court stated, simply:

> We affirm his findings as to punitive damages.

Id. at 898. The South Carolina Supreme Court did not offer any further rationale for the affirmance.

The Supreme Court of Appeals of West Virginia recently affirmed a punitive damage award on a similar absence of reasoning. In *Tanner v. Rite Aid of West Virginia, Inc.*, 461 S.E.2d 149 (W. Va. 1995), the court in affirming offered the following conclusion:

> After reviewing the record as a whole in the light most favorable to the Appellees, we cannot say that respective awards for $12,000 in compensatory damages and $18,000 in punitive damages meet the required standard for remand.

Id. at 162. The court did not in any way explain why it could not say that the award was excessive.

Similarly, in *Sessums v. Northtown Limousines, Inc.*, 664 So. 2d 164 (Miss. 1995), the jury in an odometer roll-back/consumer fraud case awarded plaintiffs $5,230 in actual damages and $100,000 in punitive damages. On appeal, the Mississippi Supreme Court affirmed, offering no more analysis than this:

> Given the facts of this case and the need to deter Sessums and others from engaging in a similar course of conduct in the future, we cannot say the jury's award of $100,000.00 in punitive damages was excessive.

Id. at 170.

And in a recent federal case, *Johansen v. Combustion Engineering, Inc.*, 67 F.3d 314 (11th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3486 (Jan. 4, 1996) (No. 95-1072), a $15 million punitive damage award resulted in this opinion from the Eleventh Circuit:

> PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

See id.[1]

The absent analysis offered by these courts does not comport with Due Process. This Court has stressed, above all, that one of the principal limits on punitive awards imposed by the Due Process Clause is that such awards must be reasonable in scope in light of their purposes. *See, e.g., Pacific Mut. Life Ins. Co Haslip*, 499 U.S. 1, 18, 22, (1991). In the present case, as in the cases discussed above, defendants were held liable for punitive damages — often for huge sums — yet the appellate courts offered no rational reason for the award. When an appellate court does not — or cannot — explain why the award is "reasonable," Due Process is simply not satisfied. Certiorari should be granted to consider this important and recurring issue.

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[1] The problem of inadequate appellate review is not limited to jury trials, but infects appeals from bench trials as well. In *Okocha v. Fehrenbacher*, 655 N.E.2d 744 (Ohio Ct. App. 1995), an appeal from a trial court's award of $50,000 in punitive damages (on top of a jury award of $5,945.23 in actual damages), the Court of Appeals of Ohio recited the generally applicable standards for punitive damages, and concluded simply that "[w]e find no evidence that the trial court abused its discretion in awarding damages." *Id.* at 753.

And in a most remarkable case, *Pridemore v. Cherry*, 903 S.W.2d 705 (Tenn. Ct. App. 1995), the defendants in a civil fraud case appealed from a court award of $25,000 in punitive damages. The appellate court held that the chancellor had properly decided to award punitive damages, and then proceeded to quote the list of nine factors for setting the amount of punitive damages, announced by the Tennessee Supreme Court in *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901-02 (Tenn. 1992). Without any analysis, the appellate court decided to *increase* the punitive award by four times:

> Based upon the enumerated factors, we find that the punitive damages award should be increased from $25,000.00 to $100,000.00. The record fully supports such an increase. Defendants' conduct in this case is reprehensible, and as such, plaintiff is entitled to punitive damages in the amount of $100,000.00.

Pridemore, 903 S.W.2d at 709.

II. CLOSE APPELLATE REVIEW OF PUNITIVE DAMAGES AWARDS IS CRITICAL AND REQUIRED BY DUE PROCESS.

As applied to punitive damages, the law of Due Process has evolved significantly over the past several years. *See, e.g., Honda*, 114 S. Ct. 2331; *TXO*, 113 S. Ct. 2711; *Haslip*, 499 U.S. at 18 (1991); *see also BMW of North America, Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994), *cert. granted*, 115 S. Ct. 932 (1995).

Out of those decisions come some basic principles. *One*, the Due Process Clause "imposes a substantive limit on the size of punitive damage awards" (*Honda*);[2] *two*, although this Court has yet to give many contours to that "substantive limit," it does mean, among other things, that punitive damages must not be "greater than reasonably necessary to punish and deter" (*Haslip*); *three*, whether an award is "greater than reasonably necessary to punish and deter" is a case-specific inquiry which must be made with due regard for the facts of the case (*TXO*); and *four*, effective appellate review must be provided in order to assure that the punitive award does not cross the substantive line between appropriate and excessive (*Honda*).

Petitioners have shown convincingly that the procedural guarantees of the Due Process Clause go far in policing this limit. In particular, Due Process requires courts to give punitive awards a "close," effective appellate review so that this substantive limit is not exceeded. Pet. 18-22. Thus, as Petitioners have explained, this Court has leaned heavily on the procedural guarantees of the Due Process Clause to ensure that the substantive component of that Clause is not violated by large punitive damage awards. This is confirmed by the Court's more general Due Process precedents.

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[2] *See also, e.g., TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2718-19 (1993) (plurality opinion); *id.* at 2731 (O'Connor, J., dissenting); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

This Court has often used the three-part inquiry of *Mathews v. Eldridge*, 424 U.S. 319 (1976) "as 'a general approach for testing challenged state procedures under a due process claim.'" *Medina v. California*, 112 S. Ct. 2572, 2576 (1992) (quoting *Parham v. J.R.*, 442 U.S. 584, 599 (1979)). Significantly, *Mathews* is regularly applied to civil forfeitures,[3] where — just as with punitive damages — there is an inherent risk that property will be taken without Due Process. *Compare United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 515 & n.1 (1993) (Thomas, J., concurring in part and dissenting in part) *with, e.g., Honda*, 114 S. Ct. at 2340; *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 86-89 (1988) (O'Connor, J., concurring).

Under the test set forth in *Mathews*, the courts consider three factors to determine whether procedural safeguards are adequate to provide Due Process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures [currently] used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. Each of the three components of *Mathews* indicates that Due Process is violated when courts fail to provide close review of large jury awards of punitive damages, as was the case here.

1. The Private Interest Is Substantial. There can be no question but that the monetary "private interest" affected in this case — and indeed in most punitive damage cases — is substantial. Punitive awards are often "enormous." *See, e.g.,*

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[3] *See, e.g., United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 501-04 (1993).

Haslip, 499 U.S. at 54, 61 (O'Connor, J., dissenting); William H. Volz & Michael C. Fayz, *Punitive Damages and the Due Process Clause: The Search for Constitutional Standards*, 69 U. Det. Mercy L. Rev. 459, 462 n.17 (1992).

Effective, "close" appellate review becomes more critical as the punitive award becomes more onerous: As then-Judge Posner has said of punitive damages, "The heavier the sanction, the more confidence there should be that it is justified." *Ampat/Midwest, Inc. v. Illinois Tool Works, Inc.*, 896 F.2d 1035, 1044 (7th Cir. 1990). Here, the jury ordered that a substantial sum — six million dollars — be taken from Petitioners and given to Respondents. Under any standard, that award is "substantial," and deserving of close appellate review.

2. The Absence Of Effective Review Carries A High Risk Of Erroneous Deprivation. The procedures utilized by the Colorado courts — here, in truth, the *absence* of procedures — carried with them a high risk of "erroneous deprivation." As explained by the Court in *Honda:*

> Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts . . . Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger.

Id. at 2340-41. Thus, as the Court explained in *Honda*, appellate review is critical to any fair and rational system of punitive damages. Without such review comes an "acute danger" that excessive jury awards will be left standing.

The cases are legion in which juries have run amok in awarding huge punitive sums bearing no rational relationship to the goals of punishment and deterrence. So long as juries award punitive damages, some juries will misstep and award disproportionate punitive damages beyond the "substantive limit" of the Due Process Clause. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *TXO Prod. Corp. v. Alliance*

Resources Corp., 113 S. Ct. 2711, 2723 (1993) (Stevens, J., joined by Rehnquist, C.J. and Blackmun and Kennedy, JJ.); *id.* at 2738 (O'Connor, J., joined by White and Souter, JJ., dissenting). The cure for such missteps is in the hands of judges, who alone can provide the procedural protections which ensure that punitive awards fall within the substantive limits of the Due Process Clause.

But where the appellate review is effectively absent, as it was here and in the cases discussed in Section I above, such thin review is no more of a "procedural safeguard" than no review whatever. When an opinion is essentially silent, as the court of appeals' opinion was here, there can be no assurance that effective appellate review (and therefore Due Process) was given. As Professor James Boyd White has suggested, if courts did not issue opinions, courts would be perceived as "actors in a voiceless bureaucracy, silent figures ruling the lives of others, never explaining themselves, in a system that Kafka might recognize as his own." James Boyd White, *What's an Opinion For?*, 62 U. Chi. L. Rev. 1363, 1364 (1995).[4] It goes almost without saying that a Kafkan, "voiceless bureaucracy" is not synonymous with Due Process.

So it was in this case. Petitioners had a substantial portion of their business cut out by a Colorado jury — and no Colorado judge has yet offered a rational explanation why that should have been so. Here is the totality of what Colorado courts have said on the merits of Petitioner's Due Process challenge to the crippling $6 million punitive damage award which the jury levied against it:

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[4] *See also* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1372 (1995) (one reason judges write opinions is "to demonstrate our recognition that under a government of laws, ordinary people have a right to expect that the law will apply to all citizens alike").

- **Trial Court:** "Plaintiff's Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial is denied." (Pet. App. 19a)

- **Court of Appeals:** "We conclude that the award here, which was limited to an amount equal to the compensatory damages awarded on East Hampden's breach of fiduciary duties claim, does not violate the Due Process Clause of the United States Constitution." (Pet. App. 15a)

- **Supreme Court:** "IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED." (Pet. App. 17a)

Nowhere did any Colorado court offer a rational explanation of why a $6 million punitive award against a $29 million company was reasonable and no greater than necessary to accomplish the goals of punishment and deterrence.

Indeed, the court of appeals appeared to hold that no appellate review for excessiveness is required so long as the punitive award does not exceed the actual damage award.[5] But it is no answer to say that so long as the ratio of compensatory to punitive damages falls within statutory limits, no appellate review is required. Certainly, punitive awards which satisfy the statutory ratio may still be excessive given the circumstances of the case — such as here, where Petitioners' liability for *compensatory* damages was premised on an issue of first impression in Colorado which had been decided contrarily in every other jurisdiction. *See* Pet. 6 & n.4; 11-13.

Judges, through the mechanism of close post-verdict review, are the only protection against violations of Due Process. Certainly, the jury cannot be expected to assess the constitutionality of its own awards or evaluate whether their own

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[5] Colorado caps the amount of punitive damages in most cases to the amount of compensatory damages. Colo. Rev. Stat. 13-21-102(1)(a). *See also* Pet. 20.

award is prejudicial. And the jury is not institutionally suited to do so: Juries are particularly ill-equipped to determine when a penalty furthers the state's legitimate goals. James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1159 (1984); David Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258, 1320-21 (1976).[6] Thus, judges must closely review punitive damage awards to ensure that they comport with substantive Due Process and are not subject to prejudice.

Indeed, *not* providing effective appellate review is presumptively unconstitutional. As this Court explained in *Haslip*,

> Under the traditional common-law approach, *the amount* of the punitive award is initially determined by a jury . . . . The jury's determination is then reviewed by *trial and appellate courts* to ensure that it is reasonable.

Haslip, 499 U.S. at 15 (emphasis added). The fact that Colorado's trial and appellate courts all but abandoned their "traditional common-law" role is further confirmation that Petitioners were deprived of Due Process. *Honda*, 114 S. Ct. at 2339 (a State's "abrogation of a well-established common law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause").

"When . . . absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of Due Process." *Honda*, 114 S. Ct. at 2340 (citing *Tumey v. Ohio*, 273 U.S. 510 (1927); *Brown v. Mississippi*, 297 U.S. 278 (1936); *In re Oliver*,

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[6] "Probably, many on jury panels can not think of punishment as a means to an end, as an expedient for reformation and deterrence, and only regard punishment as legal, justifiable revenge." Clarence Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1179 (1931).

333 U.S. 257 (1948); and *In re Winship*, 397 U.S. 358, 361 (1970)).

3. Effective Appellate Review Is Minimally Burdensome To The Government And Not Burdensome At All To The Opposing Party. The final factor in the *Mathews* calculus is the burden that would be worked upon the state, or on the opposing party (*see Connecticut v. Doehr*, 501 U.S. 1, 10-11 (1991)), by providing close appellate review.

Neither plaintiffs, nor the State of Colorado, would be significantly burdened were the appellate courts to provide close appellate review of punitive damage awards. Certainly plaintiffs have no cognizable interest in preserving awards that are constitutionally excessive. And the courts, which issue opinions as a matter of course, would be minimally, if at all burdened by adding a brief, reasoned explanation for reaching the decisions that they do. Even if close appellate review was said to work a minor burden upon the courts, a state's interest in economy is "necessarily tempered by [the State's] interest in . . . fair and accurate adjudication." *Ake v. Oklahoma*, 470 U.S. 68, 79 (1985).

Close appellate review has an added benefit: It aids the work of reviewing courts by allowing the higher court to understand the reasoning of the lower one. *See* Pet. 19; *see also Lawrence v. Chater*, 64 U.S.L.W. 3460, 3461 (U.S. Jan. 8, 1996) (noting that the failure of lower courts to issue opinions often requires this Court to GVR). And, as pointed out by Petitioners, the requirement of a reasoned decision serves two other goals: One, it has "a disciplining effect on courts" (Pet. 21) which ensures that irrational decisions are not reached; two, reasoned explanations further public confidence in the jury and court systems. (*Id.*)

Requiring appellate courts to issue reasoned explanations for their decisions would be a minimal, if any, burden on state courts. The attendant benefits, however, would be great. Thus, certiorari should be granted to make explicit what was implicit in *Honda*: The Due Process Clause's requirement of appellate

review of punitive damage awards means that the review provided must be reasoned and effective.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, certiorari should be granted.

Respectfully submitted,

SHERMAN JOYCE
VICTOR E. SCHWARTZ*
AMERICAN TORT REFORM ASSOCIATION
1212 New York Avenue, N.W.
Washington, D.C. 20005
(202) 682-1168

Of Counsel:

CAROLINE LUTZ
ACROMED CORPORATION

JOHN S. PYKE
M.A. HANNA COMPANY

MCDARA P. FOLAN
THE ALLEN GROUP

CHARLES A. BITTENBENDER
NACCO INDUSTRIES, INC.

JON GROETZINGER, JR.
AMERICAN GREETINGS CORPORATION

THOMAS A. PIRAINO
PARKER HANNIFIN CORPORATION

MARK V. SANTO
ELSAG BAILEY, INC.

DALE A. NORMINGTON
THE SHERWIN-WILLIAMS COMPANY

*Counsel of Record

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No. 95-1051

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LIFE CARE CENTERS OF AMERICA, INC. AND AMERICAN LIFESTYLES, INC.,

Petitioners,

v.

EAST HAMPDEN ASSOCIATES LIMITED PARTNERSHIP, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

REPLY OF THE PETITIONERS

TIMOTHY B. DYK
(Counsel of Record)
GREGORY A. CASTANIAS
DANIEL H. BROMBERG
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, DC 20005-2088
(202) 879-3939

JEAN E. DUBOFSKY
JEAN E. DUBOFSKY, P.C.
Canyon Center Building
1881 9th Street, Suite 210
Boulder, Colorado 80302
(303) 447-3510

Counsel for Petitioners

11 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 7

TABLE OF AUTHORITIES

Page

Cases

Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs., 596 A.2d 687 (Md. Ct. Spec. App. 1991) 3

Ampat/Midwest, Inc. v. Illinois Tool Works, Inc., 896 F.2d 1035 (7th Cir. 1990) 3

BMW of North America, Inc. v. Gore, 115 S. Ct. 932 (1995) 6

Dunn v. Hovic, 1 F.3d 1371 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993) 2

CEH, Inc. v. F/V Seafarer, 70 F.3d 694 (1st Cir. 1995) . . . 5

Frick v. Abell, 602 P.2d 852 (Colo. 1979) 2

Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897 (W. Va. 1991) 3

Green Oil v. Hornsby, 539 So. 2d 218 (Ala. 1989) 6

Herman v. Sunshine Chem. Specialties, Inc., 627 A.2d 1081 (N.J. 1993) 5

Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994) 1

Johnson v. Hugo's Skateway, 974 F.2d 1408 (4th Cir. 1992) 3

Mathews v. Eldridge, 424 U.S. 319 (1976) 2

Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991) 2

Orijas v. Stevenson, 31 F.3d 995 (10th Cir.), *cert. denied*, 115 S. Ct. 511 (1994) 2

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 4, 6

Robertson Oil Co. v. Phillips Petroleum Co., 14 F.3d 373 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2120 (1994) 2

Southwestern Telegraph & Telephone Co. v. Danaher, 238 U.S. 482 (1915) 3

TABLE OF AUTHORITIES (Cont'd.)

Page

Miscellaneous

Abraham & Jeffries, *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. Leg. Stud. 415 (1989) 5

Annotation, *Punitive Damages: Relationship to Defendant's Wealth As Factor In Determining Propriety of Award*, 87 A.L.R.4th 141, at §§ 3-6 (1991) . 5

REPLY OF THE PETITIONERS

1. In their Brief in Opposition ("Opp."), Respondents do not refute Life Care's showings that there are conflicts among the lower courts, and with this Court's decisions, regarding (a) whether close appellate review is constitutionally required (Pet. 15-22) (b) whether the closeness of the case must be considered by appellate courts reviewing punitive damage awards (Pet. 11-13), and (c) whether a defendant's net worth must be considered by appellate courts in reviewing the appropriateness of the punitive award. (Pet. 13-15)

2. Respondents' submission is instead largely devoted to arguing an irrelevant proposition — that there was sufficient evidence to support *a* punitive damage award against Petitioners under Colorado law. *See* Opp. 1-2, 12-13, 17-18, 20-22. The issues here concern only violations of the substantive and procedural components of the Due Process Clause, not sufficiency of the evidence under Colorado law.

3. Respondents do not refute Life Care's showing (Pet. 21) that the court of appeals' decision exacerbates a clear and pervasive conflict among the lower courts, and with this Court's decision in *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), regarding the Due Process Clause's requirement of appellate review. Respondents urge, in a footnote, that *Honda* is "not relevant to this case." (Opp. 13 n.6) But that is simply not so: In *Honda* this Court held that "Oregon's denial of judicial review of the size of punitive damage awards violates the Due Process Clause." *Honda*, 114 S. Ct. at 2341. Respondents speculate that the court of appeals gave the punitive award careful appellate review (*e.g.*, Opp. 22); however, there is no indication from the court of appeals' opinion that this was so. Life Care's contention is that the opinion must itself show that the close review was given (Pet. 21); absent an opinion, there can be no assurance that effective review — and therefore Due Process — is provided.

4. The importance of, and conflict on, this issue is further confirmed by the brief *amici curiae* of The American Tort Reform Association *et al.* Those *amici* have persuasively shown that, despite this Court's decision in *Honda*, lower courts are

continuing to deny meaningful appellate review to punitive damage awards, affirming large punitive exactions with little or no analysis whatsoever. *Amici* have also shown, convincingly, that denying such meaningful review violates Due Process under the traditional three-factor analysis of *Mathews v. Eldridge*, 424 U.S. 319 (1976), and that review of this issue is important.

5. Life Care also showed (Pet. 15-18) that the "passion-and-prejudice" review applied in Colorado amounts to no review at all, and that there is a conflict among lower courts regarding the constitutionality of a "passion-and-prejudice" review of the size of punitive awards.

a. Respondents' first argument (Opp. 20-21) is that Colorado does not in fact apply passion-and-prejudice review. That is demonstrably wrong. Under Colorado law, as Respondents note (at 21) courts review the *fact* of punitive damage awards for sufficient evidence. But the only "reasonableness" review which Colorado courts give to the *size* of the award is limited to inquiring "if the jury was impermissibly motivated by prejudice or properly guided by the purposes for exemplary damages." *Frick v. Abell*, 602 P.2d 852, 854 (Colo. 1979). *See also Orijas v. Stevenson*, 31 F.3d 995, 1013 (10th Cir.), *cert. denied*, 115 S. Ct. 511 (1994); Pet. 15-18.

b. Respondents then urge that there is not a conflict in the lower courts because "Life Care's reliance upon the pre-*TXO* decision in *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), is misplaced." (Opp. 21) Respondents have only confirmed the existence of a deep and insoluble conflict. Respondents correctly point out that the Third and Tenth Circuits have explicitly refused to adopt the *Mattison* analysis,[1] but they fail to point out (Opp. 22 n.13) that the "several judges of the Fourth Circuit [who] have criticized *Mattison*" (four out of 13)

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[1] *See Robertson Oil Co. v. Phillips Petroleum Co.*, 14 F.3d 373, 379 n.8 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2120 (1994); *Dunn v. Hovic*, 1 F.3d 1371, 1381 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993).

did so in dissent, in an *in banc* decision which reaffirmed *Mattison*. *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1414-18 (4th Cir. 1992) (*in banc*). And Respondents totally fail to address the conflicting State-court decisions cited by Life Care,[2] which hold that such supine appellate review violates Due Process. *See* Pet. 17.

6. Life Care showed that the decision below, which refused to consider the closeness of the case as shown by the law of other jurisdictions, conflicts with this Court's decision in *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482 (1915), and with the precedents of other courts. Pet. 11-13; *see also Ampat/Midwest, Inc. v. Illinois Tool Works, Inc.*, 896 F.2d 1035, 1044 (7th Cir. 1990) (Posner, J.) ("This was a close case on liability for fraud, and it makes sense to scale down an award of [punitive] damages in recognition of a distinct possibility that the judgment may be premised on a mistaken finding of liability"). Respondents urge three points in opposition.

a. Respondents contend that "this Court has never required an analysis of 'the closeness of the case'" (Opp. 13), yet they totally fail to mention, let alone distinguish, *Danaher*, which held that a penalty premised on conduct having "the support of repeated adjudications in other jurisdictions" was so arbitrary as to violate Due Process. *Danaher*, 238 U.S. at 491. Nor do Respondents cite or attempt to distinguish the other cases cited by Life Care. This conceded conflict merits certiorari.

b. Respondents suggest that the case was not, in fact, close because "no jurisdiction has or would condone Life Care's conduct" of "schem[ing] to divert patients," "unlawful competition," etc. (Opp. 18-19)[3] Yet Respondents are unable to

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[2] *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 908 (W. Va. 1991); *Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs.*, 596 A.2d 687, 709-11 (Md. Ct. Spec. App. 1991).

[3] Despite Respondents' inaccurate and pejorative recounting of the facts (Opp. 2-12), which suggests that Life Care was found liable for deliberately ruining Respondents' business, the case was not presented

contest Life Care's showing (Pet. 6 & n.4) that until the decision in this case, the law of all jurisdictions was uniformly contrary to the theory of liability adopted by the Colorado courts in this case. Life Care's "scheme" was only "unlawful" because Colorado's courts, alone among all American jurisdictions, held that a nonexclusive agent was barred from competing with his principal. Respondents' pejorative adjectives aside, had the case arisen in any of these other jurisdictions, Life Care's competition would plainly have been "lawful" — and not deserving of *any* liability at all, let alone *punitive* liability.

c. Lastly, Respondents attempt to tax Life Care with failing to raise the closeness of the case as an evidentiary matter at trial. (Opp. 17) But only the courts, not a jury, can evaluate whether a case is "close" on the law. The issue here is whether this inquiry should be part of the courts' post-trial review.

7. Life Care also showed (Pet. 13-15) that appellate courts must consider a defendant's net worth in order to assure that the punitive award comports with the Due Process requirement that the award be no "greater than reasonably necessary to punish and deter." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991). Respondents do not dispute that the punitive award constituted over 20% of Life Care's then-net worth, and they do not offer a rational reason for a 20% penalty in this case. Nor do they dispute the existence of a conflict among lower courts on this issue. (*See* Pet. 14) The arguments they do offer are unconvincing. -

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to the jury on such a theory. Indeed, the jury in this case had only to find that Life Care willfully competed without consent from the nursing home in order to find punitive liability. In addition to Jury Instruction 65 (set forth in the Appendix to the Brief in Opposition), *see* Jury Instruction No. 26, which provided in pertinent part: "It is a breach of fiduciary duty to compete with principal with respect to the subject matter of the agency unless the principal understands that the agent is to compete or a course of dealing between the agent and the principal indicate that this is understood."

a. Respondents say (Opp. 19 n.10) that the court of appeals *did* consider Life Care's net worth. But the court of appeals' opinion confirms that that court did not evaluate the award against Life Care's net worth; instead, that court simply mentioned Life Care's net-worth argument and followed that statement immediately with the *non sequitur* that the statutory maximum one-to-one ratio of compensatory to punitive damages perforce obviated any Due Process challenges to punitive damage awards. Pet. App. 15a; *see also* Pet. 13.

b. Next, Respondents cite decisions from the First and Eighth Circuits for the unremarkable proposition that there is "no general rule defining the maximum proportion of net worth that may be exacted." Opp. 19 (quoting *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 706 (1st Cir. 1995)). But that is exactly why appellate courts must consider a defendant's net worth — there is "no general rule" because punitive damage awards must be evaluated in each case. *See* Pet. 14-15. As Respondents' own case confirms, "the consideration of . . . net worth is integral to the objectives of punitive damages: it ensures that the award is neither too severe nor too trivial." *CEH, Inc.*, 70 F.3d at 706.

c. Lastly, Respondents again argue "waiver" because Life Care did not offer evidence of its net worth to the jury. (Opp. 20) This argument misses the point entirely. First, some "scholars have suggested that consideration of wealth [in punitive damage cases] may be unconstitutional." *Herman v. Sunshine Chem. Specialties, Inc.*, 627 A.2d 1081, 1087 (N.J. 1993) (citing Abraham & Jeffries, *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. Leg. Stud. 415, 416, 424-25 (1989)). Second, regardless of whether a company's net worth is considered by the jury as evidence,[4] it is critical that appellate

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[4] *See generally* Annotation, *Punitive Damages: Relationship to Defendant's Wealth As Factor In Determining Propriety of Award*, 87 A.L.R.4th 141, at §§ 3-6 (1991) (indicating that jurisdictions are split over the propriety of allowing evidence of a defendant's net worth in punitive damage actions).

courts consider that factor to ensure that the award is no greater than reasonably necessary to punish and deter. For instance, Alabama's *Green Oil* decision, which this Court approved as a proper approach to judicial review of punitive damages in *Haslip*, 499 U.S. at 22, held that although "the jury is not allowed to consider the financial position of the defendant" under Alabama law, "[t]he defendant's financial position is, however, a consideration essential to a post-judgment critique of a punitive damages award." *Green Oil v. Hornsby*, 539 So. 2d 218, 222 (Ala. 1989).[5]

8. Lastly, Respondents urge (Opp. 22) that the pending case of *BMW of North America, Inc. v. Gore*, 115 S. Ct. 932 (1995) (granting certiorari) "has no bearing on this case" because in *BMW* the Alabama Supreme Court did not "offer[ ] any explanation for the remittitur" of the punitive damage award. This purported distinction is premised on Respondents' erroneous view that the court of appeals gave the size of this punitive award searching appellate review. Moreover, Respondents do not dispute Life Care's showings that this case presents the same closeness-of-the-case (Pet. 13) and appellate review (Pet. 22) issues as does *BMW*. At a minimum, this case should be held for the decision in *BMW*.

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[5] Respondents also suggest in a footnote (Opp. at 20 n.11) that Life Care's post-trial briefs did not argue this point. Again, not so. In its post-trial briefs, Life Care pointed out that the $6 million compensatory award was more than adequate to punish and deter future violations, and that the addition of the punitive damage award violated Due Process because it constituted a disproportionate share of Life Care's $29 million net worth. Brief in Support of Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial at 91-92; Reply Brief in Support of Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial at 39-40.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition and in the *amicus* brief of The American Tort Reform Association *et al.*, certiorari should be granted.

Respectfully submitted,

TIMOTHY B. DYK
(Counsel of Record)
GREGORY A. CASTANIAS
DANIEL H. BROMBERG
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, DC 20005-2088
(202) 879-3939

JEAN E. DUBOFSKY
JEAN E. DUBOFSKY, P.C.
Canyon Center Building
1881 9th Street, Suite 210
Boulder, Colorado 80302
(303) 447-3510

Counsel for Petitioners

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